(11)

No. 83-1894-CFX
Status: GRANTED

Title: Pattern Makers' League of North America, AFL-CIO, et al., Petitioners
v.
National Labor Relations Board, et al.

Docketed:
May 18, 1984

Court: United States Court of Appeals for the Seventh Circuit

Counsel for petitioner: Gold, Laurence

Counsel for respondent: Solicitor General, Fahy, Edward J.

Entry	Date	Note	Proceedings and Orders
1	Mar 9 1984		Application for extension of time to file petition and order granting same until April 19, 1984 (Stevens, March 9, 1984).
2	Apr 9 1984		Application for further extension of time to file petition and order granting same until May 18, 1984 (Stevens, April 10, 1984).
3	May 18 1984	G	Petition for writ of certiorari filed.
5	Jun 14 1984		Order extending time to file response to petition until July 21, 1984.
6	Jul 16 1984		Order further extending time to file response to petition until August 20, 1984.
7	Aug 15 1984		Memorandum of respondents NLRB, et al. filed.
8	Aug 22 1984		DISTRIBUTED. September 24, 1984
9	Oct 1 1984		Petition GRANTED.
10	Oct 18 1984	G	Motion of the parties to dispense with printing the joint appendix filed.
12	Oct 29 1984		Motion of the parties GRANTED.
13	Nov 19 1984		Brief of petitioners Pattern Makers', et al. filed.
14	Nov 19 1984		Brief amicus curiae of Teamsters for a Democratic Union filed.
15	Dec 12 1984		Brief of respondent Rockford-Beloit Pattern, etc. filed.
16	Dec 13 1984		Record filed.
17	Dec 13 1984		Certified copy of C. A. proceedings received.
18	Dec 13 1984		Record filed.
19	Dec 13 1984		Certified original record, volumes I thru III received.
20	Dec 15 1984		Brief amicus curiae of Safeway Stores, et al. filed.
21	Dec 15 1984		Brief amicus curiae of Natl. Right to Work Legal Defense Foundation, Inc. filed.
22	Dec 15 1984		Brief amicus curiae of Chamberof Commerce of the US filed.
24	Dec 19 1984		Order extending time to file brief of responcent on the merits until January 9, 1985.
25	Jan 4 1985		SET FOR ARGUMENT. Wednesday, February 27, 1985. (1st case.)
26	Jan 10 1985		CIRCULATED.
27	Jan 9 1985	X	Brief of respondent NLRB, et al. filed.
28	Feb 20 1985	X	Reply brief of petitioners Pattern Makers', et al. filed.
29	Feb 27 1985		ARGUED.

83-1894

No. 83-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

PATTERN MAKERS' LEAGUE OF NORTH AMERICA, AFL-CIO, AND ITS ROCKFORD AND BELOIT ASSOCIATIONS,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD

and

ROCKFORD-BELOIT PATTERN JOBBERS ASSOCIATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Is the National Labor Relations Board granted the authority by the National Labor Relations Act, as amended, to invalidate provisions in union constitutions and bylaws requiring union members to retain their membership during a strike or lockout or at a time when a strike or lockout appears imminent?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Pattern Makers' League of North America, AFL-CIO, and its Rockford and Beloit Associations hereby petition this Court to issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review the judgment in *Pattern Makers' League et al. v. National Labor Relations Board*, 724 F.2d 57 (7th Cir. No. 83-1045; Dec. 21, 1983).

OPINIONS BELOW

The National Labor Relations Board's decision and order in this case is reported at 265 NLRB No. 170, and is reprinted at pp. 9a-44a of the appendix (hereafter "App.") to this petition. The Seventh Circuit's opinion

and judgment is reported at 724 F.2d 57 and is reprinted at App. 1a-8a.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Seventh Circuit were issued on December 21, 1983. On April 10, 1984, Justice Stevens signed an order extending the time for filing a petition for writ of certiorari to and including May 18, 1984. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 7 of the National Labor Relations Act ("NLRA"), as amended, 29 U.S.C. § 157, provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section § 8(a)(3) of this Act.

Section 8(b)(1)(A) of the NLRA, 29 U.S.C. § 158(b)(1)(A), provides:

> It shall be an unfair labor practice for a labor organization or its agents—
>
> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 of this Act: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; . . .

STATEMENT OF THE CASE

A. The Facts

All members of petitioner Pattern Makers' League (hereafter "the League" or "the Union") take an Oath of Membership obligating them to adhere to the Union's "Constitution, Laws, Rules and Decisions." App. 30a. And, League Law 13 provides:

> [N]o resignation or withdrawal from an Association, or from the League, shall be accepted during a strike or lockout, or at a time when a strike or lockout appears imminent. [App. 28a, n.3.]

This amendment to the Union's governing laws was ratified in August 1976 by a membership vote after "appropriate notice procedures" (App. 30a), and became effective in October 1976 (*id.*).

The following year, on May 5, 1977, petitioners Rockford and Beloit Associations (hereafter "the Local Unions") commenced a strike against the Rockford-Beloit Pattern Jobbers Association, a multiemployer association. All members of the Local Unions received notice of, and all but one participated in, the secret ballot vote authorizing the strike. App. 30a. All striking members received between $125 and $150 a week in strike benefits. *Id.* Nonetheless, and notwithstanding the restriction on resignation contained in League Law 13,[1] some eleven union members attempted to resign their membership during the strike and then returned to work while the strike was still in effect. App. 27a-28a, 29a-30a. The direct result of their actions, according to unrebutted testimony, was that the strike was prolonged, and that it became necessary for the Local Unions to accept a contract embodying substandard wages and benefits. App. 31a.

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[1] "There is no contention . . . that the members who tendered their resignations were unaware of the restrictions on resignation imposed [by League Law 13]." App. 33a-34a.

The strike ended on December 19, 1977. On January 26, 1978, the Unions sent letters to the members who attempted to resign during the strike, informing them that their resignations could not be accepted because those resignations were in violation of League Law 13, and after appropriate proceedings, the strikebreaking members were fined for working for the struck employers. In response those individuals filed charges with the National Labor Relations Board (hereafter "NLRB" or "the Board"), claiming that the Union had violated § 8(b)(1)(A) of the National Labor Relations Act, as amended.

B. The Proceedings in the NLRB

After a decision by an Administrative Law Judge, the NLRB, "having determined that this and another case involving the right of a labor organization to impose restrictions on a member's right to resign presented issues of importance in the administration of the National Labor Relations Act" (App. 9a), set both cases for oral argument in tandem on January 16, 1980 before the entire Board.

After nearly three years of consideration, the companion case, *Machinists Local 1327 (Dalmo Victor)*, 263 NLRB 984 (1982), was decided by the Board on September 10, 1982, with the decision in the instant case following on December 16, 1982. In both cases the Board held that the respondent unions had committed unfair labor practices by fining members who resigned their membership and returned to work during a strike, even though the union's constitution or laws expressly restricted resignations during strike periods.

In *Dalmo Victor*, four of the five Board members held, in two separate, lengthy, and somewhat divergent opinions, that a union rule permitting union members to resign only if the resignations are submitted no later than

14 days preceding the commencement of a strike is unenforceable.[2]

Members Fanning and Zimmerman found that "a union rule which limits the right of a union member to resign only to nonstrike periods constitutes an unreasonable restriction on a member's Section 7 right to resign." 263 NLRB, at 986. However, "find[ing] it salutary to set forth a general rule for the behavior of parties in the area," these two Board Members decreed that unions ordinarily may prohibit their members from resigning only "for a period not to exceed 30 days after the tender of such a resignation." *Id.*, at 987.

Chairman Van de Water and Member Hunter agreed that the Machinists had commited an unfair labor practice by fining its resigning members, but challenged their colleagues' 30-day rule as "an arbitrary exercise of this Board's authority" that represented "a transparent

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[2] The rule at issue in *Dalmo Victor* provides: Resignation shall not relieve a member of the obligation to refrain from accepting employment at the establishment for the duration of the strike or lockout within 14 days preceding its commencement." The NLRB originally held that this provision is not a restriction on resignation during the strike period but, instead, a restriction on postresignation conduct, and found an unfair labor practice on that theory. 231 NLRB 115 (1977). On review the Ninth Circuit rejected the Board's construction of the clause as "hypertechnical," concluding that the provision "is a restriction on a member's right to resign." *NLRB v. Machinists Local 1327*, 608 F.2d 1219, 1222 (9th Cir., 1979). Because the Board majority had not reached the question whether a union constitutional provision restricting resignation would be valid, the Ninth Circuit remanded the case to the Board. Pursuant to the remand, the Board accepted as the law of the case the Ninth Circuit's construction of the Machinists' provision (263 NLRB, at 984 n.4), and proceeded to decide "whether a union can, pursuant to an internal rule prohibiting resignations during a strike or within 14 days preceding its commencement, lawfully impose a fine on members who tendered resignations and returned to work during the course of a strike" (*id.* at 984).

effort to achieve a legislative result rather than a reasoned legal conclusion." *Id.* These two Board Members concluded that *any* restriction imposed by a union upon its members' right to resign would be *per se* unreasonable, and any fine or any other discipline imposed for violation of such a restriction would constitute an unfair labor practice under § 8(b)(1)(A). *Id.*, at 988.

Member Jenkins dissented in *Dalmo Victor*, concluding that the Machinists prohibition of resignations during a strike, or within the 14 days preceding a strike, constituted a reasonable and valid internal union rule explicitly protected by the proviso to § 8(b)(1)(A). *Id.*, at 994. In his view,

> [the union] was entitled to levy fines against the Charging Parties as a means of enforcing a lawful constitutional provision governing retention of membership, a subject expressly excluded from the scope of Section 8(b)(1)(A) by the proviso thereto, and within the ambit of a union's control over its internal affairs. [*Id.*]

In the instant case, the Board wrote very briefly on the pertinent issue, adopting both the result and rationale of the *Dalmo Victor* case:

> . . . League Law 13 suffers from the same infirmity as did the rule in *Dalmo Victor*. While League Law 13 apparently provides for resignations during nonstrike periods, it clearly prohibits any such resignations once a strike has begun or when one "appears imminent." Under the Board's holding in *Dalmo Victor*, League Law 13 can be construed as neither valid nor enforceable. [App. 13a.] [3]

[3] There were other, separate unfair labor practice charges resolved in the Board decision and order in this case. None of these other Board determinations were contested in the Court of Appeals (App. 2a-3a, n.1), and no question concerning these holdings is presented in this petition.

Member Jenkins filed a dissenting opinion in *Pattern Makers*, as he did in *Dalmo Victor*. He stated:

> I would find that League Law 13, as applied herein, is a reasonable and narrow restriction on the employees' right to resign their union membership, and is within the ambit of the Union's control over its internal affairs. Accordingly, I also would find that the fines imposed pursuant to League Law 13 on the 10 employees who crossed the Union's picket lines were lawful and not in violation of the proscriptions of Section 8(b)(1)(A) of the Act. [App. 22a.]

C. The Proceedings in the Court of Appeals

The Unions sought review of the Board's decision insofar as that decision invalidated League Law 13 in the Court of Appeals for the Seventh Circuit. That court upheld the Board's ruling.

The Seventh Circuit began from the premise that the instant case is one "present[ing] an apparent conflict between two fundamental policies underlying the NLRA" which the court identified as the right of employees to refrain from collective bargaining activities and the right of unions to regulate their internal affairs without congressional or court interference (App. 3a-4a). The court below acknowledged that this Court has twice explicitly *left open* the question whether union constitutional provisions restricting resignations during a strike period are enforceable under the NLRA. See App. 1a and *Booster Lodge No. 405 v. NLRB*, 412 U.S. 84, 88-90 (1973); *NLRB v. Granite State Joint Board*, 409 U.S. 213, 217 (1972). Nonetheless, the Seventh Circuit viewed the very cases which had declined to decide the question, as well as an *earlier* case, *Scofield v. NLRB*, 394 U.S. 423 (1969), as establishing that "[a]n employee's right to resign cannot be overridden by union interests in 'group solidarity and mutual reliance'" (App. 6a). Further, while the court below acknowledged that "[t]he Union

plainly has power to control its internal matters by enforcing rules reflecting the will of the majority of its members," that court viewed "[a]n employee's decision to resign [as] personal [and not] . . . merely an 'internal matter'" (App. 7a).

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW IS IN SQUARE CONFLICT WITH THE DECISION OF THE NINTH CIRCUIT IN *MACHINISTS LOCAL 1327 v. NLRB*, 725 F.2d 1212.

A. The decisions of the Seventh Circuit and the Ninth Circuit are in square conflict as to whether the NLRA grants the NLRB the authority to rule—as the Board did in *Dalmo Victor* and then in this case (see pp. 4-7 *supra*)—that union restrictions on resignations during a strike are invalid. *Dalmo Victor* itself was reversed by the Ninth Circuit in *Machinists Local 1327 v. NLRB*, 725 F.2d 1212 (Feb. 14, 1984).[4] The Ninth Circuit expressly noted that the Seventh Circuit had, in this case, approved the Board's rule (*id.* at 1217, n.5), and expressly disagreed with the Seventh Circuit's holding and its reasoning.

Unlike the court below, the Ninth Circuit viewed the new Board rule against union restrictions on resignations during a strike as one which "frustrates federal labor policy in important respects." 725 F.2d, at 1215. Relying on *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967), the Ninth Circuit stressed that:

> [N]either Congress nor the [Supreme] Court gave individual members license to avoid union rules designed to protect the welfare of the bargaining unit. [This is why] Congress . . . enacted the proviso to § 8(b)(1)(A), which reserves to unions the power

[4] The NLRB's petition for rehearing in *Machinists Local 1327*, filed March 26, 1984, is presently pending.

> to make reasonable rules regarding the retention and acquisition of membership. [725 F.2d, at 1216.]

Further, the Ninth Circuit disagreed with the view of the Board, echoed by the Seventh Circuit in this case (App. 3a-4a), that this Court has, subsequent to *Allis-Chalmers*, established "a balancing test" allowing "either the Board or the courts to conduct an ad hoc weighing of the allegedly competing interests described in the main text of § 8(b)(1)(A) on the one hand, and the proviso to § 8(b)(1)(A) on the other." 725 F.2d at 1216-17. And the Ninth Circuit explicitly and emphatically rejected as "false" the basic premise of the Board and of the court below—that there is a "conflict between the employee's right to resign union membership and the union's interest in making rules regarding the acquisition and retention of membership." 725 F.2d at 1217; *see also id.*, at n.5 (noting that the Seventh Circuit in this case assumed the same conflict as did the Board):

> These rights are preserved in § 7 and § 8(b)(1)(A) of the Act, respectively. Because *both* the employee's right and the union's interest are policies that have been "embedded" in the labor laws for over 35 years, neither can "impair" or "override" the other within the meaning of *Scofield*. They must—and do—coexist. [725 F.2d at 1217 (emphasis in original).]

Finally, unlike the Board and the court below, the Ninth Circuit, while recognizing that "'the power of the union over the member is certainly no greater than the union-member contract'" (725 F.2d at 1218, *quoting Granite State Board*, *supra*, 409 U.S., at 217), maintained that, under the § 8(b)(1)(A) proviso, the member's obligation is, under the present circumstances, also no *less* than the obligation the union constitution and laws establish:

> [T]he terms of the contract before us condition the member's right to resign on his promise not to break the strike. If the member can escape his obligations

> by pleading, when the union attempts to collect the fine, that he is no longer part of the union, then the terms of this contract mean little. [725 F.2d at 1218.]

B. The conflict between the Seventh Circuit and the Ninth Circuit concerns an important and recurring question central to the national labor policy. Indeed, this Court has three times addressed issues concerning union fines imposed upon employees who, in violation of union rules, work during a strike, expressly leaving for later decision the precise question presented in this case.

In *Allis-Chalmers*, *supra*, the question was whether a union that fines members who cross a union's picket line and return to work during an authorized strike violates § 8(b)(1)(A) of the Act. This Court held that, even though §7 does otherwise protect the right of employees to refrain from joining in strike activity (388 U.S., at 178), such union discipline of strikebreaking members does not constitute the "restraint or coercion" made unlawful by § 8(b)(1)(A).

First, the *Allis-Chalmers* Court ruled unanimously (*see* 388 U.S., at 199 (White, J., concurring)) that the substantive rule of conduct being enforced—that union members must respect the collective decision to strike by refraining from working for the struck employer—is in no way at odds with national labor policy, but, rather, is one the union has every right to impose:

> Integral to . . . federal labor policy has been the power in the chosen union to protect against erosion its status under that policy through reasonable discipline of members who violate rules and regulations governing membership. That power is particularly vital when the members engage in strikes. The economic strike against the employer is the ultimate weapon in labor's arsenal for achieving agreement upon its terms, and "[t]he power to fine or expel strikebreakers is essential if the union is to be an effective bargaining agent. . . ." Provisions in union

> constitutions and bylaws for fines and expulsion of recalcitrants, including strikebreakers, are therefore commonplace and were commonplace at the time of the Taft-Hartley amendments. [388 U.S., at 181.]

Similarly, it was common ground that "the proviso to § 8(b)(1)(A) preserves to the union the power to *expel* the offending member." 388 U.S., at 183; emphasis supplied; *id.*, at 190; *id.*, at 199 (White, J., concurring); *id.*, at 199-200 (Black, J., dissenting). In that case, however, the proviso to § 8(b)(1)(A) did not in terms apply, because the anti-strikebreaking rule was not enforced by a sanction directly affecting membership but, instead, through a court-enforced fine. It was this circumstance which gave rise to the dispute in *Allis-Chalmers*. The majority in that case, after surveying the background of the main body of § 8(b)(1)(A), determined that the 1947 Congress did not intend in that section to interfere with "the relationship of a union member to his own union" (*id.*, at 191):

> Union membership allows the member a part in choosing the very course of action to which he refuses to adhere. . . . [A] distinction between court enforcement and expulsion would [therefore] have been anomalous. . . . Congress was operating within the context of the "contract theory" of the union-member relationship. . . . The efficacy of a contract is precisely its legal enforceability. . . . Thus this history of congressional action does not support a conclusion that the Taft-Hartley prohibitions against restraint or coercion of an employee to refrain from concerted activities included a prohibition against the imposition of fines on members who decline to honor an authorized strike and attempts to collect such fines. Rather, the contrary inference is more justified in light of the repeated refrain . . . that Congress did not propose any limitations with respect to the internal affairs of unions, aside from barring enforcement of a union's internal regulations to affect a member's employment status. [388 U.S., at 191, 192 & 195.]

In two later cases, *Granite State Board*, *supra*, and *Booster Lodge*, *supra*, the Court was faced with situations in which unions attempted to discipline employees for violating the union's rule against strikebreaking *after* resigning their union membership.[5] In both cases the Court held that

> the power of the union over the member is certainly no greater than the union-member contract. Where a member *lawfully* resigns from a union and thereafter engages in conduct which the union rule proscribes, the union commits an unfair labor practice when it seeks enforcement of fines for that conduct. [*Granite State Board*, *supra*, 409 U.S., at 217 (emphasis supplied); *see also Booster Lodge*, *supra*, 412 U.S., at 88.]

The Seventh Circuit in this case purported to find in *Granite State Board* and *Booster Lodge* compelling support for the proposition that union members have an absolute right under §§ 7 & 8(b)(1)(A) of the NLRA, enforceable despite an explicit union constitutional provision to the contrary, to resign from a union during a strike and return to work. App. 4a-7a. Both decisions, however, expressly and repeatedly, limited their holdings to situations in which "[n]either the contract nor the Union's constitution or bylaws contained any provision defining or limiting the circumstances under which a member could resign." *Granite State Board*, *supra*, 409 U.S., at 214. Indeed, this qualification appears a total of five times in the four-page *Granite State Board* opinion,[6]

[5] The only significant difference between the two cases was that in *Granite State Board*, the penalty for working during the strike was imposed after the strike began, by a vote at a membership meeting (409 U.S., at 214), while in *Booster Lodge*, the union's constitution expressly prohibited members from strikebreaking (412 U.S., at 84).

[6] Aside from the quotation in the text, these instances are as follows:

and the same number of times in the five-page *Booster*

(1) Under § 7 of the Act the employees have "the right to refrain from any or all" concerted activities relating to collective bargaining or mutual aid and protection, as well as the right to join a union and participate in those concerted activities. *We have here no problem of construing a union's constitution or bylaws defining or limiting the circumstances under which a member may resign from the union.* We have, *therefore*, only to apply the law which normally is reflected in our free institutions—the right of the individual to join or to resign from association, as he sees fit. . . . [409 U.S., at 216 (emphasis supplied).]

(The court of appeals' reference to this passage as supporting an absolute right under the NLRA to resign from labor unions (App. 5a) ignores the underlined sentence, and thereby grievously distorts this Court's evident meaning—*viz.*, that as a contractual matter union members, like other members of voluntary associations, may resign their membership *absent a valid restriction on resignation.*)

(2) [T]he power of the union over the member is certainly *no greater* than the union member contract. . . . [W]hen there is a *lawful* dissolution of a union-member relation, the union has no more control over the former member than it has over the man in the street. [409 U.S., at 217 (emphasis supplied).]

(3) [W]hen a member *lawfully* resigns from the union, its power over him ends. [409 U.S., at 215 (emphasis supplied).]

(4) We do not now decide to what extent the contractual relationship between union and member may curtail the freedom to resign. *But where, as here, there are no restraints on the resignation of members*, we conclude that the vitality of § 7 requires that the member be free to refrain in November from the action he endorsed in May. . . . [409 U.S., at 217-18 (emphasis supplied).]

(Again, the court below distorted the Court's meaning in this passage by relying on the immediately succeeding phrase—that a union member's "§ 7 rights are not lost by a union's pleas for solidarity or by its pressures for conformity and submission to its regime" (409 U.S., at 218, quoted App. A—)—while ignoring the Court's explicit limitation of this observation to circumstances other than those here present.)

Lodge opinion.[7]

In sum this Court has explicitly left for another day the question whether the NLRA limits the right of unions to limit resignations through properly promulgated provisions in their constitutions and bylaws. *Granite State Board*, *supra*, 409 U.S., at 217; *Booster Lodge*, *supra*, 412 U.S., at 88. Now that the NLRB has decided that question and the Board's rule has precipitated a square conflict in the circuits, the appropriate day for determining the question twice left open by this Court has arrived.

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[7] Those instances are:

(1) Neither [the union's] constitution nor its bylaws contained any provision expressly permitting or forbidding such resignations. [412 U.S., at 86.]

(2) Since in [*Granite State Board*] there was no provision in the Union's constitution or bylaws limiting the circumstances in which a member could resign, we concluded that the members were free to resign at will and that § 7 of the Act, 29 U.S.C. § 157, protected their right to return to work during a strike commenced while they were union members. [412 U.S., at 87-88.]

(3) Here, as in [*Granite State Board*,] the Union's constitution and bylaws are silent on the subject of voluntary resignation from the Union. And here, as there, we leave open the question of the extent to which contractual restriction on a member's right to resign may be limited by the Act. [412 U.S., at 88.]

(4) Since there is no evidence that the employees here either knew of or had consented to any limitation on their right to resign, we need "only to apply the law which is normally reflected in our free institutions—the right of an individual to join or to resign from associations, as he sees fit." [412 U.S., at 88.]

(5) The Union contends, however, that a result different from [*Granite State Board*] is warranted in this case, *even though its constitution does not expressly restrict the right to resign during a strike.* [412 U.S., at 88-89 (emphasis supplied).]

II. THE SEVENTH CIRCUIT'S DECISION IS INCONSISTENT WITH THE LANGUAGE AND LEGISLATIVE HISTORY OF § 8(b)(1)(A) OF THE NLRA.

Allis-Chalmers, *supra*, makes clear that the substantive rule of conduct enforced in this case—that union members who work for the struck employer during a duly authorized strike are subject to union discipline—is consistent with national labor policy.[8] If the Union's rule against resignations during a strike is equally valid, it follows that the Union was simply exercising its authority to fine an individual who was a member at the relevant time for violating the Union rule against strikebreaking, and was therefore, under *Allis-Chalmers*, acting lawfully.

As *Aliis-Chalmers* also recognized, a union does not violate § 8(b)(1)(A) simply by interfering in some manner with "the exercise of the rights guaranteed in [§ 7]," including the right to refrain from concerted activity. Employees have, as the Court in *Allis-Chalmers* noted (388 U.S., at 178), a right protected under § 7 of the

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[8] Because *Allis-Chalmers* has already decided this question, the heavy reliance of the court below on *Scofield*, *supra*, is misplaced. The question in *Scofield* (394 U.S. at 424-426) was whether a particular union substantive rule of conduct rule is so inconsistent with national labor policy that the rule may not be enforced in any manner, whether by fine, expulsion, or otherwise, and the purpose of the mode of analysis set out therein was to determine whether the work rule in question there met that standard. Here, that question has already been resolved, in favor of the union rule of conduct, by *Allis-Chalmers*. The open question is whether that otherwise valid rule may be applied against individuals who resign in violation of a union restriction on resignation.

Contrary to the suggestions of the court below (App. 4a), *Scofield* in no way addressed this issue. The *Scofield* court *did* observe that, in the case before it, the union member was free to leave the union at any time. 394 U.S., at 430. But, as this Court later recognized in *Granite State Board*, *supra*, 409 U.S., at 217, this observation in *Scofield* simply "indicates that the power of the union over the member is certainly no greater than the union-member contract."

Act to refuse to join in a strike. But the existence of a § 7 right was only the beginning of the analysis in *Allis-Chalmers*, not, as in the opinion below, its end point. As *Allis-Chalmers* recognized, for there to be a violation of § 8(b)(1)(A) there must be, *in addition to* some impedence of a right otherwise protected under § 7: (1) "restraint or coercion"; and (2) a kind of union action not within the proviso to § 8(b)(1)(A), which protects "*the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein.*"[9]

Although the Seventh Circuit failed to so acknowledge, there is no escaping the point that in this case, unlike *Allis-Chalmers*, the plain words of the § 8(b)(1)(A) proviso encompass rules of the kind at issue here. A rule requiring a member to retain his or her membership during a strike period is surely a rule regarding "retention of membership." Indeed, it is more clearly such a rule than an expulsion provision, which all agree is encompassed in the proviso: An expulsion provision concerns not "retention of membership" but the inverse—loss of membership.[10]

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[9] As we have seen (pp. 10-11, *supra*), *Allis-Chalmers* recognizes that enforcement of a rule against strikebreaking would indubitably be valid, because the ability of unions to expel members is protected by the proviso to § 8(b)(1)(A); only because a fine rather than expulsion was involved did the Court proceed to decide whether there was "restraint or coercion" and conclude that there was not.

[10] It is also significant that the language of the proviso speaks in terms of "*impair*[*ing*] the right of a labor organization to prescribe its own rules." Thus, Congress did not simply say that § 8(b)(1)(A) shall not prevent unions from prescribing rules of certain types. Instead the proviso is couched in terms of preserving intact of preexisting right. This language suggests a realization that there *was* a preexisting body of law regarding that "right," and that the intent was simply to leave that body of law intact. And, indeed, there is a body of common law which enforces nonarbitrary resignation restrictions in voluntary associations in circumstances very similar to the present ones. *See, e.g., Troy Iron & Nail Factory v. Corning*, 44 Barb. 231 (N.Y. 1864) (enforcing rule of a landowners' association that no member may resign as long as he continues to own or occupy certain land); *Leon v. Chrysler Motors Corp.*, 350 F.Supp. 877 (D.N.J. 1973) (enforcing a rule of a mutual advertising association that no auto dealer may resign from membership except with the consent of a majority of the association's members); *Ewald v. Medical Society*, 70 Misc. 615, 128 N.Y.S. 886, 888 (N.Y. App. 1911) (enforcing rule of a county medical society that no member charged with ethical violations may resign while such charges are pending); *Associated Press v. Emmett*, 45 F.Supp. 907, 921, 923 (S.D. Cal. 1942) (upholding a ruling requiring two years notice or consent of the Board of Directors for a resignation to be valid).

The evident meaning of the plain language of the § 8(b)(1)(A) proviso is reinforced by the history of the Taft-Hartley Act which shows a conscious decision by Congress to excise from the House bill any provision that could be read as *forbidding* unions from limiting resignations by members. As it passed the House, the bill that became the Taft-Hartley Act contained "right to refrain" language identical for present purposes to that contained in the final Act (H.R. 3020, 80th Cong., 1st Sess., § 7(a), I National Labor Relations Board, *Legislative History of the Labor Management Relations Act of 1947* ("Leg. Hist."), at 176), and *also* contained two provisions dealing specifically with the obligation to continue union membership: First, the House bill would have made it an unfair labor practice for employers and labor organizations, "by intimidating practices, to interfere with the exercise by employees of rights guaranteed in section [7] or to compel or seek to compel any individual to become *or remain* a member of any labor organization" (H.R. 3020, *supra*, § 8(b)(1), I Leg. Hist. 178-79 (emphasis added)); second, that bill would have made it an unfair labor practice for a union "to deny to any member the right to resign from the organization at any time" (H.R. 3020, *supra*, § 8(c)(4), I Leg. Hist. 180).

No equivalent to the § 8(b)(1)(A) proviso was contained in the House bill.

In putting together the final version of the statute, the Conference Committee left out *both* the foregoing attempts in the House bill to regulate union rules limiting resignations from membership, and, at the same time, included the § 8(b)(1)(A) proviso, which in its ordinary meaning validates such union rules. Thus, as in *Labor Board v. Drivers Local Union*, 362 U.S. 274 (1960) (which involved, like this case, an NLRB attempt to read into the general language of § 8(b)(1)(A) a restriction on certain union activity):

> Plainly, the [union's] conduct in the instant case would have been prohibited if the House bill had become law. But the House conferees abandoned the House bill in conference and accepted the Senate proposal. H.R. Conf. Rep. No. 510 on H.R. 3020, 80th Cong. 1st Sess., 42. . . . "It is relevant to recall that the Taft-Hartley Act was, to a marked degree, the result of conflict and compromise between strong contending forces. . . . This is relevant in that it counsels wariness in finding by construction a broad policy . . . as such when . . . it is clear that those interested in just a condemnation were unable to secure its embodiment in enacted law." [*Id.*, at 289-90.]

This is a case, then, in which there is no room for the *ad hoc* balancing approach adopted by the Board and approved by the Seventh Circuit. Rather, Congress struck the balance in 1947, and determined that whatever the reach otherwise of § 7 and of § 8(b)(1)(A) of the NLRA, unions retain the common-law right of voluntary associations to require, as a condition of membership, a commitment to remain a member during the periods critical to the success of the collective effort. Since "the accommodation between [the] competing factors has already been made by Congress" (*Machinists Local v. Labor*

Board, 362 U.S. 411, 428 (1960)), the Court should grant the petition for a writ of certiorari in order to resolve the conflict between the circuits and to restore the accommodation Congress struck.

CONCLUSION

For the reasons stated above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

No. 83-1045

PATTERN MAKERS' LEAGUE OF NORTH AMERICA, AFL-CIO, and ITS ROCKFORD AND BELOIT ASSOCIATIONS,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

ROCKFORD-BELOIT PATTERN JOBBERS ASSOCIATION,
Intervening Respondents.

Argued Sept. 27, 1983

Decided Dec. 21, 1983

Before BAUER, ESCHBACH and COFFEY, Circuit Judges.

BAUER, Circuit Judge.

The issue squarely confronting us is whether a union in its constitution may deny its members the opportunity to resign from the union during a strike or when a strike is imminent. The United States Supreme Court twice has acknowledged, but has not been required to decide, this issue. *Booster Lodge No. 405 v. NLRB*, 412 U.S. 84, 88-90, 93 S.Ct. 1961, 1964-1965, 36 L.Ed.2d 764 (1973); *NLRB v. Granite State Joint Board, Textile Workers Union, Local 1029*, 409 U.S. 213, 217, 93 S.Ct. 385, 387, 34 L.Ed.2d 422 (1972). We find such a rule invalid.

I

In May 1976, Petitioner Pattern Makers' League of North America (the Union) amended its constitution by

adding the following provision: "13. No resignation or withdrawal from an Association, or from the League, shall be accepted during a strike or lockout, or at a time when a strike or lockout appears imminent." This provision, dubbed League Law 13, was ratified in August 1976 by the membership of the various member associations of the Union.

On May 5, 1977, the Union struck members of Intervenor Rockford-Beloit Pattern Jobbers Association (the Employer), a multi-employer bargaining unit consisting of eleven companies engaged in the manufacture and sale of patterns for casting. The strike ended December 19, 1977, when the parties agreed on a new collective bargaining agreement.

Eleven employees, ten from the Beloit Association and one from the Rockford Association, tendered their resignations to the Union during the strike. The first employee resigned on September 11. He returned to work for the Employer on September 12 and on that day the Union expelled him. After the strike ended, the Union sent letters to the other ten employees explaining that their resignations were not accepted because League Law 13 prohibited resignations during strikes. The Union retained these employees as members and fined them an amount commensurate with their wages earned while working during the strike.

The National Labor Relations Board ruled that the Union violated Section 8(b)(1)(A) of the National Labor Relations Act, 29 U.S.C. § 158(b)(1)(A) (1974), by fining individuals who had tendered resignations from the Union and returned to work in violation of League Law 13.[1] The Board rested its decision on the rationale

[1] The Board further ruled, in agreement with the findings of the administrative law judge, that the Union violated Section 8(b)(1)(A) by threatening employees with reprisals in the form of physical harm or loss of accrued pension benefits if the employees crossed picket lines, and violated Sections 8(b)(1)(A) and 8(b)(2) by imposing a fine and excessive fees and dues on an employee as a condition of readmission to the Union after expelling him for submitting his resignation and by attempting to cause an employee's discharge from employment for failing to comply with the provisions of the union-security agreement. The Union has not challenged these rulings before this court, and, accordingly, they are summarily enforced.

enunciated in *Machinists Local 1327, International Association of Machinists, District Lodge 115 (Dalmo Victor)*, 263 N.L.R.B. 141 (1982), *petition for review filed*, Nos. 82-7580 & 82-7701 (9th Cir. Oct. 4, 1982). In *Dalmo Victor*, the Board determined that a union's constitutional provision prohibiting members from resigning during a strike or within fourteen days preceding its commencement was invalid and thus unenforceable. The Board reasoned that the Supreme Court holdings in *Granite State* and *Scofield v. NLRB*, 394 U.S. 423, 89 S.Ct. 1154, 22 L.Ed.2d 385 (1969), led to the "inescapable conclusion" that union members have the right to resign in both strike and non-strike situations. Because League Law 13 imposed the same type of restriction as the provision struck down in *Dalmo Victor* as an unreasonable restriction on a union member's Section 7 right to resign, the Board held that fines imposed pursuant to the law violated Section 8(b)(1)(A).[2]

II

The issue of resignations from unions presents an apparent conflict between two fundamental policies under-

[2] The Board in *Dalmo Victor* recognized the competing interest of the union in reflecting the will of the majority of its members and fashioned a rule allowing the union to impose a 30-day notice of resignation requirement on its members. Two members of the Board in the majority of the case before us—Chairman Van de Water and Hunter—concurred in *Dalmo Victor*, agreeing that the union rule impermissibly restricted the members' right to resign, but arguing that the 30-day rule announced by the majority was arbitrary and inconsistent with the NLRA and interpretive Supreme Court rulings. The issue of the validity of a Board-fashioned 30-day notice provision is not presented in this case.

lying the NLRA. First, employees should not be restrained from exercising their right to refrain from collective bargaining activities. Second, unions must be allowed flexibility to regulate their internal affairs without the interference of Congress or the courts. This apparent conflict is reflected in Section 7 of the NLRA, 29 U.S.C. § 157 (1947), which guarantees employees "the right to self-organization, . . . to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and . . . the right to refrain from any or all of such activities . . .," and in Section 8(b)(1), which makes it an unfair labor practice "to restrain or coerce (A) employees in the exercise of the rights guaranteed in section [7]: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . . ." Our task is to resolve the tension between these policies when the Union seeks absolutely to prohibit resignations during a strike or when one appears imminent.

The Union first claims that the proviso to Section 8(b)(1)(A) validates League Law 13. That section gives a union flexibility to manage its own affairs. Although the Supreme Court has not resolved this issue, its decisions guide our analysis of the Union's claim. The Supreme Court, in considering the parameters of a union's authority, has developed an analysis that distinguishes between union rules that touch wholly "internal" affairs and rules that affect "external" activities. *Scofield*, 394 U.S. at 429-30, 89 S.Ct. at 1157-58. The *Scofield* Court stated that "it has become clear that if the rule invades or frustrates an overriding policy of the labor laws the rule may not be enforced, even by fine or expulsion, without violating § 8(b)(1)." *Id.* at 429, 89 S.Ct. at 1158.

The Supreme Court has applied this standard consistently to invalidate union rules that conflict with the

fundamental policies of the NLRA. For example, in *Granite State* many union members resigned during a strike and returned to work. The union levied fines against those workers for violating a membership resolution that any member aiding or abetting the employer during the strike would be subject to a fine. The Supreme Court ruled that the union's fines frustrated the overriding "right of the individual to join or to resign from associations, as he sees fit . . . ." *Granite State*, 409 U.S. at 216, 93 S.Ct. at 387. Similarly, in *Booster Lodge* the union sought court enforcement of fines it imposed on employees who had resigned from the union. The employees had returned to work despite a union constitutional provision prohibiting strikebreaking by union members. The union argued that the obligation to refrain from strikebreaking bound union members notwithstanding their resignations. *Booster Lodge*, 412 U.S. at 89, 93 S.Ct. at 1964. The Supreme Court stated:

> [I]n order to sustain the Union's position, we would first have to find, contrary to the determination of the Board and of the Court of Appeals, that the Union constitution by implication extended its sanctions to nonmembers, and then further conclude that such sanctions were consistent with the Act. But we are no more disposed to find an implied post-resignation commitment from the strikebreaking proscription in the Union's constitution here than we were to find it from the employees' participation in the strike vote and ratification of penalties in [*Granite State*].

Id. at 89-90, 93 S.Ct. at 1964-1965 (footnote omitted).

Although the unions in *Granite State* and *Booster Lodge* did not restrict resignations, the Court's reasoning applies equally here. The Section 7 right to refrain from union activities encompasses the right of members to resign from the union. *See, e.g., Granite State*, 409 U.S. at 216, 93 S.Ct. at 387; *NLRB v. Ma-*

chinists Local 1327, International Association of Machinists, 608 F.2d 1219, 1221 (9th Cir. 1979); *NLRB v. Martin A. Gleason, Inc.*, 534 F.2d 466, 476 (2d Cir. 1976). We think that because League Law 13 completely suspends an employee's right to choose not to be a union member and thus no longer subject to union discipline, it frustrates the overriding policy of labor law that employees be free to choose whether to engage in concerted activities. An employee's right to resign cannot be overridden by union interests in "group solidarity and mutual reliance in situations in which a collective effort is necessary to achieve a particular result" upon which the Union so heavily relies. Petitioners' br. at 9-10. Although a union has a powerful interest in maintaining its strength during a strike, *see N.L.R.B. v. Allis-Chalmers Manufacturing Co.*, 388 U.S. 175 at 181, 87 S.Ct. 2001 at 2007, 18 L.Ed.2d 1123, an employee's Section 7 rights "are not lost by a union's plea for solidarity or by its pressures for conformity and submission to its regime." *Granite State*, 409 U.S. at 218, 93 S.Ct. at 387. *See id.* (Burger, C.J., concurring) ("[T]he institutional needs of the Union, important though they are, do not outweigh the rights and needs of the individual.").

An employee's right to resign not only is guaranteed by Section 7, but also is supported by an employee's own strong interests. Among those interests are an employee's freedom to change his or her mind about the usefulness or effectiveness of a strike, such as when an employer has been able to replace the strikers, or an employee's desire to return to work for completely personal reasons, such as family hardship. A union rule compelling membership fully subject to union authority improperly infringes upon these interests. Moreover, forced continued membership distorts the balance between encouraging collective activities among workers and protecting individuals from coercion.

The Union plainly has power to control its internal matters by enforcing rules reflecting the will of the ma-

jority of its members. *See Allis-Chalmers*, 388 U.S. at 181, 87 S.Ct. at 2007. When an employee is a full union member he or she is subject to those rules; when that employee resigns, the union's power ends. Just as the Union's power may not extend to an employee's post-resignation activities, it also may not extend to forbid an employee from resigning. An employee's decision to resign is personal; a union rule requiring retention of membership cannot be considered merely an "internal matter." Accordingly, a union cannot compel membership during a strike under the proviso to Section 8(b)(1)(A) in derogation of an employee's right to choose whether to be a part of such concerted activity.

The Union's second argument in support of League Law 13 is its theory of "mutual reliance": because the Union members relied on each other when voting to strike, they waived their Section 7 right to abandon the strike by resigning from the Union. The Union stresses that each member joined the Union or retained Union membership with the knowledge that resignations were prohibited during strikes or lockouts. The Union claims the union-employee relationship is thus voluntary and enforceable.

The Supreme Court, however, gave this mutual reliance theory "little weight" in *Granite State*, 409 U.S. at 217, 93 S.Ct. at 387, and determined that, in the absence of a union rule restraining resignations, Section 7 requires that Union members remain free to change their minds and resign during a strike. In that case union members voted to strike and, soon after the strike began, voted unanimously to fine strikebreakers. The First Circuit concluded that union members who voted had waived their right to resign without penalty in the interest of allowing the union to maintain strike discipline. 446 F.2d 369, 372-74 (1st Cir. 1972), *rev'd*, 409 U.S. 213, 93 S.Ct. 385, 34 L.Ed.2d 422 (1972). The

Supreme Court decided that the employees' interests took precedence.

We can discern no qualitative difference between employees agreeing not to aid or abet a company during a strike and a union rule forbidding resignations during a strike. Indeed, the principal reason for a rule prohibiting resignations during strikes is to insure that union members do not aid the company by returning to work.[3] Nonetheless, employees should have the right to change their minds about remaining members of the union.

III

The Supreme Court held in *Scofield* that a union rule setting a ceiling on the production for which union members could accept immediate pay did not contravene any policy of the NLRA. The concept that union members were free to leave the union and escape the rule was central to the Court's analysis. *Scofield*, 394 U.S. at 430, 89 S.Ct. at 1158. "If a member chooses not to engage in this concerted activity and is unable to prevail on the other members to change the rule, then he may leave the union and obtain whatever benefits in job advancement and extra pay may result . . . ." *Id.* at 435, 89 S.Ct. at 1161. This fundamental principle is the embodiment of individuals' Section 7 rights and safeguards the balance between individual rights and the collective power of the union. The principle applies to the circumstances presented in this case.

The petition for review is denied.

ENFORCEMENT GRANTED.

[3] It is the same thing to say that a rule prohibiting resignations during strikes is designed to strengthen the union's power through strike solidarity.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case 33-CB-1132

PATTERN MAKERS' LEAGUE OF NORTH AMERICA,
AFL-CIO, and ITS ROCKFORD AND BELOIT ASSOCIATIONS

and

ROCKFORD-BELOIT PATTERN JOBBERS ASSOCIATION

DECISION AND ORDER

On November 21, 1978, Administrative Law Judge Gerald A. Wacknov issued the attached Decision in this proceeding. Thereafter, the Respondents, Pattern Makers' League of North America, AFL-CIO, Rockford Association, and Beloit Association, filed exceptions and a supporting brief and the General Counsel filed limited exceptions and a brief in support thereof, as well as a brief otherwise in support of the Administrative Law Judge's Decision.

On December 12, 1979, the Board, having determined that this and another case,[1] involving the right of a labor organization to impose restrictions on a member's right to resign, presented issues of importance in the administration of the National Labor Relations Act, as amended, scheduled oral argument for January 16, 1980. Thereafter, on January 16, 1980, Respondents, the General Counsel, the Charging Party, and the American

[1] *Machinists Local 1327, International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge 115 (Dalmo Victor)*, 263 NLRB No. 141 (1982).

Federation of Labor and Congress of Industrial Organizations,[2] presented their oral arguments before the Board.

The Board has considered the record and the attached Decision in light of the exceptions, briefs, and oral arguments, and, for the reasons stated below, has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge,[3] as modified herein.

The principal issue in this case involves the question of whether Respondents violated Section 8(b)(1)(A) of the Act by imposing fines on members who tendered resignations and returned to work during the course of a strike in apparent contravention of Respondents' rule prohibiting resignations during a strike or lockout or when one appeared imminent.

The pertinent facts reveal that, in May 1976, Respondents, in an attempt to end what they viewed as "a regular pattern of strikebreaking by employers," adopted and ratified an amendment to their constitution, known as League Law 13, which provided that "no resignation or withdrawal from an Association, or from the League, shall be accepted during a strike or lockout, or at a

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[2] The American Federation of Labor and Congress of Industrial Organization appeared as *amicus curiae* and argued orally on behalf of Respondents' position.

[3] The Administrative Law Judge, *inter alia*, found that Respondents had violated Sec. 8(b)(1)(A) of the Act by threatening employees with physical harm and loss of accrued pension benefits if they crossed the picket line, and had violated Secs. 8(b)(2) and 8(b)(1)(A) by imposing a fine and excessive fees and dues on employee William Kohl after expelling him from membership for having submitted his resignation. No exceptions were taken to these findings.

The Administrative Law Judge, however, also found that Respondent Beloit Association had not sought to have employee John Nelson discharged for failing to comply with the terms of a union-security agreement, as alleged by the General Counsel. The General Counsel has excepted to this finding. For the reasons more fully discussed, *infra*, we find merit to the General Counsel's exception.

time when a strike or lockout appears imminent." Thereafter, on or about May 5, 1977, Respondents commenced a strike against Rockford-Beloit Pattern Jobbers Association, a multiemployer association, and its individual members which culminated on December 19, 1977, with the execution of a collective-bargaining agreement that contained, among other things, a union-security clause. During the course of that strike, 10 employees tendered their resignations from the Respondent Associations[4] and returned to work. By letters dated January 26, 1978, Respondents notified these employees that their resignations were in violation of League Law 13 and would not be accepted; they further informed them that they were being fined for returning to work during the strike.

The General Counsel contends that League Law 13 unlawfully intrudes into the rights guaranteed to employees by Section 7 of the Act and that, consequently, the fines imposed thereunder are unlawful and in violation of Section 8(b)(1)(A) of the Act. Respondents, on the other hand, assert that League Law 13 constitutes a valid exercise of their right to enact internal union rules governing the acquisition and retention of membership, as set forth in the proviso to Section 8(b)(1)(A). They therefore argue that the fines imposed on those individuals who resigned and returned to work during the strike in violation of such rule were lawful. The Administrative Law Judge found no merit to Respondents' contention. Rather, he noted that "[t]he blanket prohibition of resignations or withdrawals during strikes

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[4] The record reveals that employees John Cammilleri, Donald Carlson, Jerry Mikkelson, Lawrence Wilkins, Pierre LaBounty, Fred Bull, Ralph Hopper, David Darling, and Lannie McDonald tendered their resignations to Respondent Beloit and employee Jon Wenger tendered his resignation to Respondent Rockford. As noted in fn. 3, *supra*, employee Kohl also tendered his resignation during the strike, was expelled from the Union, and was subsequently fined. As stated, however, no exceptions were taken to the Administrative Law Judge's findings concerning Kohl.

embodied in League Law 13 permits of no exceptions or qualifications, obviously according no weight whatsoever to the competing considerations often confronting striking employees." He thus concluded that League Law 13 constitutes "an impermissible encroachment on employees' statutory right to resign union membership and that the fines imposed thereunder are in violation of the Act."

The Administrative Law Judge's findings in this regard are in substantial accord with the Board's recent holding in *Dalmo Victor*, *supra*, which, as noted, involved a similar issue. In *Dalmo Victor*, the Board was asked to determine the validity of a provision in a union's constitution which prohibited members from resigning during the course of a strike or within 14 days preceding its commencement. The Board there found that provision to be invalid and unenforceable.[5] In so doing, the Board noted that in *Scofield, et al.* v. *N.L.R.B.*, 394 U.S. 423 (1969), the Supreme Court stated that union members must be free to leave a union to escape membership conditions which they consider onerous. Additionally, the Board noted that in *N.L.R.B.* v. *Granite State Joint Board, Textile Workers Union of America, Local 1029 AFL-CIO* [*International Paper Box Machine Co.*], 409 U.S. 213 (1972), the Supreme Court "recognized that there may be circumstances under which a member might feel compelled to resign during a strike." Finding nothing in the *Scofield* or other subsequent Supreme Court decisions to suggest that a member's right to resign could be limited to nonstrike periods only and finding that a reading of the *Scofield* and *Granite State* decisions lead to the inescapable conclusion that "a member's right to resign from a union applies both to strike and nonstrike situation," the Board held that "a union rule which limits the right of a union member to resign only to nonstrike periods constitutes an unreasonable restriction on a

[5] Member Jenkins dissented.

member's Section 7 right to resign."[6] Applying its holding to the rule in question, the Board concluded that, since the rule failed to provide for resignations during a strike, it was neither valid nor enforceable. It accordingly found the fines imposed thereunder to be in violation of Section 8(b)(1)(A) of the Act.

In the instant case, Respondent's League Law 13 suffers from the same infirmity as did the rule in *Dalmo Victor*. While League Law 13 apparently provides for resignations during nonstrike periods, it clearly prohibits any such resignations once a strike has begun or when one "appears imminent." Under the Board's holding in *Dalmo Victor*, League Law 13 can be construed as neither valid nor enforceable. Consequently, we find, in agreement with the Administrative Law Judge, that the fines imposed pursuant to League Law 13 were unlawful and violative of Section 8(b)(1)(A) of the Act.[7]

[6] *Id.*, sl. op., pp. 10-11. In *Dalmo Victor*, the Board also found that, while a member has a Sec. 7 right to resign from a union and return to work during a strike, "a union's need to reflect the continuing will of a majority of its members, especially during a strike, reflects not only a legitimate union interest but also implements a right inherent in the statutory scheme of our labor laws." In view of the competing interests involved, neither of which was deemed to be absolute, the Board found it "salutary to set forth a general rule for the behavior of parties in this area." Thus, it stated that a rule restricting a member's right to resign for a period not to exceed 30 days (unless extraordinary circumstances warranted a longer period) after the tender of resignation would be considered reasonable. While concurring that the provision in question constituted an unreasonable restriction on a member's right to resign, Chairman Van de Water and Member Hunter would find that any restriction on a member's right to resign, including a 30-day limitation, would be unreasonable. See their separate opinion in *Dalmo Victor*, *supra*.

[7] Although we agree with the Administrative Law Judge that League Law 13 is unenforceable, we find his recommendation that that provision be expunged from Respondents' constitution to be inappropriate and shall accordingly delete such language from his recommended Order.

We also find, contrary to the Administrative Law Judge, that Respondent Beloit Association unlawfully sought to have employee John Nelson discharged from his position with Atlas Pattern Works (hereinafter Atlas) for failing to comply with the provisions of the union-security agreement. The record in this regard reveals that Nelson began working for Atlas in March 1977, and never became a member of Respondent Beloit, which represented Atlas' employees. On or about January 14, 1978, Nelson tendered to Respondent Beloit a check representing dues for the month of January 1978.[8] However, on January 17, 1978, Respondent Beloit returned the check to Nelson with a letter stating that, since he was not a union member, it could not accept dues from him which he did not owe. That same day, Respondent Beloit sent Atlas a letter informing it that Nelson had failed to comply with the terms of the union-security agreement that went into effect on December 19, 1977, and requested that Atlas "take appropriate action to rectify this situation." [9]

The General Counsel alleges that Respondent Beloit's letter to Atlas concerning Nelson constituted a request for his discharge for failing to meet his obligations under the union-security agreement and that Respondent had breached its fiduciary duty to inform employees of their obligations under such agreements. The Administrative Law Judge disagreed with the General Counsel noting that the letter to Atlas was sent 3 days before Nelson's discharge could actually have been requested under the agreement and further noting that no attempt to discharge Nelson or interfere with his job tenure was made

[8] Under the terms of the union-security agreement executed on December 19, 1977, employees were required to become members within 30 days of employment.

[9] An identical letter concerning Kohl's failure to comply with the union-security agreement was sent by Respondent Beloit to Atlas just 3 days before th Nelson letter. The Administrative Law Judge found that that letter amounted to an implied request for Kohl's discharge and violated Secs. 8(b)(2) and 8(b)(1)(A) of the Act. As noted in fn. 3, *supra*, no exceptions were taken to this finding.

upon the expiration of the required period. He also found that Respondent Beloit had not breached any fiduciary duty owed to Nelson and concluded that it had not violated Section 8(b)(2) or 8(b)(1)(A) of the Act, as alleged. As noted, we disagree with that finding.

It is well settled that a union seeking to enforce a union-security provision against an employee has a fiduciary duty to inform that employee of his obligations so that the employee may take the steps necessary to protect his job.[10] That duty, the Board has held, requires that a union provide the employee with "a statement of the precise amount and months for which dues [are] owed, as well as an explanation of the methods used in computing the amount," plus "an opportunity to make payment." [11] As evident from the above facts, Nelson, although apparently unaware or uncertain of what his obligations were under the union-security agreement, nevertheless made a good-faith effort to comply with those obligations by tendering his dues to Respondent Beloit on January 14. However, instead of advising Nelson of the extent of his obligations under the new contract when it rejected his tender of dues, Respondent Beloit chose merely to inform him that he was not a union member and that consequently he did not owe any dues.[12] Under these circumstances, we find that Respond-

[10] *Chauffeurs, Salesdrivers & Helpers Union, Local 572, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Ralphs Grocery Company)*, 247 NLRB 934 (1980).

[11] *Id.* at 935.

[12] It is apparent from Respondent Beloit's letter to Atlas, when viewed in light of the former's refusal to accept Nelson's tender of dues, that Respondent Beloit equated Nelson's continued employment with Atlas, under the terms of the union-security clause, with his becoming a full member of its Association. However, the Board in this respect has long held that "while contracts requiring membership as a condition of employment are lawful within the meaning of the proviso to Section 8(a)(3), a union cannot lawfully compel

ent Beloit has not fulfilled its fiduciary duty of informing Nelson of his obligations under the union-security agreement executed on December 19, 1977.[13]

Further, we find that Respondent Beloit's letter to Atlas requesting that it take "appropriate action" concerning Nelson's failure to join its Association constituted a request for his discharge. In this respect, we note, as previously stated, that an identical letter concerning Kohl's failure similarly to comply with the terms of the union-security agreement amounted to an implied request for his discharge. We see no reason why the Nelson letter should be construed any differently from the Kohl letter, especially when viewed in light of Respondent Beloit's breach of its fiduciary duty owed to Nelson. For the above-stated reasons, we find that Respondent Beloit un-

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. . . the discharge of an employee except for his failure to pay required dues and initiation fees." *Hershey Foods Corporation*, 207 NLRB 897 (1973).

[13] Even assuming *arguendo*, that Nelson knew of his obligations as of May 1977 under the prior contract, as alleged by Respondent Beloit, there was nevertheless a continuing obligation on Respondent's part to notify Nelson of his obligations under the new contract since "an employee is not presumed to be on notice as to the extent of his obligations to the union during successive terms." See *Conductron Corporation, a subsidiary of McDonnell Douglas Corporation*, 183 NLRB 419, 425 (1970), citing *N.L.R.B.* v. *International Union of Electrical, Radio, and Machine Workers, AFL-CIO* [*General Motors Corporation*], 307 F.2d 679 (D.C. Cir. 1962).

Moreover, in light of Respondent Beloit's rejection of Nelson's tender of dues on the ground that he had no dues obligations, we find that Respondent Beloit was thereafter estopped from demanding that Nelson be discharged for failing to meet his obligations under the union-security agreement. As previously noted, Respondent Beloit improperly equated continued employment under that agreement with the obtainment of full membership in its organization. Thus, it is clear that, even if Nelson had known of his obligations under the contract, Respondent Beloit would nevertheless have violated the Act, as alleged, by unlawfully requiring, as a condition of employment, that Nelson become a full, rather than a financial core, member of its Association.

lawfully sought to have Nelson discharged and in so doing violated Sections 8(b)(2) and 8(b)(1)(A) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondents, Pattern Makers' League of North America, AFL-CIO, Washington, D.C., Rockford Association, Rockford, Illinois, and Beloit Association, Beloit, Wisconsin, their officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Giving force or effect to League Law 13.

(b) Restraining or coercing employees who have resigned from Respondents by imposing fines on such employees for working during a sanctioned strike.

(c) Causing or attempting to cause Atlas Pattern Works or any other employer to discharge or otherwise discriminate against any of its employees for failure to comply with the terms of a union-security clause without adequately advising them of their obligations, in violation of Section 8(a)(3) of the Act.

(d) Imposing fines and other penalties upon former members for conduct in which they engaged after their effective resignation from Respondents, as conditions of regaining union membership under the provisions of a union-security clause, and attempting to cause an employer to seek an employee's compliance therewith.

(e) Threatening employees with physical harm, property damage, a loss of pension benefits, or any other reprisals for working during the course of a sanctioned strike.

(f) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act, except to the extent that such rights may be affected by an ageement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Rescind the fines levied against employees for their post-resignation activity of working during the course of a strike, and notify said employees that such fines have been rescinded.

(b) Rescind the fines, excessive back dues, and readmission fee imposed upon William Kohl as a condition of his regaining membership in the Beloit Association, and so notify Kohl of such action.

(c) Expunge from the records of said employees any reference to fines levied against them for their post-resignation conduct.

(d) Notify Atlas Pattern Works, in writing, with copies to employees William Kohl and John Nelson, that they have no objection to the continued employment of said employees.

(e) Post at their business offices and meeting halls copies of the attached notice marked "Appendix."[14] Copies of said notice, on forms provided by the Regional Director for Region 33, after being duly signed by authorized representatives of Respondents, shall be posted by

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[14] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Respondents immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondents to insure that said notices are not altered, defaced, or covered by any other material.

(f) Mail to the Regional Director for Region 33 sufficient signed copies of said notice for posting by employer-members of the Rockford-Beloit Pattern Jobbers Association, if the employers are willing, in places where notices to employees are customarily posted. Said copies, after being duly signed by Respondents' authorized representatives, shall be returned forthwith to the Regional Director.

(g) Notify the Regional Director for Region 33, in writing, within 20 days from the date of this Order, what steps Respondents have taken to comply herewith.

Date, Washington, D.C. December 16, 1982

JOHN R. VAN DE WATER, Chairman

DON A. ZIMMERMAN, Member

ROBERT P. HUNTER, Member
NATIONAL LABOR RELATIONS BOARD

[SEAL]

MEMBER FANNING, concurring and dissenting in part:

I agree with the majority in all respects save that I do not find that Respondents violated the Act by "giving force or effect to League Law 13," which simply prohibits resignations from the League during a strike or when one is imminent. As I explained in *Dalmo Victor*,[15] a labor organization's restrictions on resignation are relevant in cases involving union discipline of employees only to the extent that the labor organization defends that the employee is a union member and had consented to be bound to union rules. Where the restriction is not a valid one—and I agree that League Law 13 is not—it may not be relied upon as a bar to resignation; in that case, the labor organization cannot defend its action as one taken against a member.

The League Law does not, however, have any impact on the employment relationship and, therefore, does not violate any law or policy this Agency is charged with enforcing. It is a procedural rule purporting only to regulate the release of a member from the Union's rolls.

Neither Section 8(b)(1)(A) nor the Act in general regulates the purely internal affairs of labor organizations.[16] The proviso to Section 8(b)(1)(A) stakes out the limit of Federal restriction in this area and leaves

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[15] *Machinists Local 1327, International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge 115 (Dalmo Victor)*, 263 NLRB No. 141 (1982), sl. op., p. 8, fn. 13.

[16] Before the 1959 Landrum-Griffin amendments, which come under the jurisdiction of the Department of Labor, the Supreme Court observed that "the protection of union members in their rights as members from arbitrary conduct by unions and union officers has not been undertaken by federal law, and indeed the assertion of any such power has been expressly denied." *International Association of Machinists* v. *Gonzales*, 356 U.S. 617, 620 (1958).

to labor organizations the right to police their rolls.[17] Strictly internal union discipline, that is discipline which does not directly affect the employment relationship, is not regulated by the National Labor Relations Act unless it is contrary to an overriding policy in the labor laws.[18] Indeed, our jurisdiction reflects this: It requires an employer's involvement in commerce even in cases where a labor organization is the respondent.

There is no basis for concluding that a union rule, which on its face only regulates union membership rolls, may not be maintained without violating the Act. League Law 13 has no effect on the employment relationship, and its maintenance should not be unlawful simply because the League sought to rely upon it to show a binding union-member compact which had, in law, been vitiated.

Dated, Washington, D.C. December 16, 1982

JOHN H. FANNING, Member
NATIONAL LABOR RELATIONS BOARD

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[17] *Local 283, United Automobile, Aircraft and Agricultural Implement Workers of America, UAW-AFL-CIO (Wisconsin Motor Corporation)*, 145 NLRB 1097, 1133 (1964).

[18] *Scofield, et al.* v. *N.L.R.B.*, 394 U.S. 423 (1969).

MEMBER JENKINS, dissenting in part:

I join in all my colleagues' findings except their affirmance of the Administrative Law Judge's finding that the fines imposed on the 10 employees who resigned from Respondents during the strike and crossed Respondents' picket lines to return to work violated Section 8(b)(1)(A) of the Act.

For the reasons set forth in my separate dissenting opinions in *Machinists Local 1327, International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge 115 (Dalmo Victor)*, 263 NLRB No. 141 (1982), and 231 NLRB 719 (1977), I would find that League Law 13, as applied herein, is a reasonable and narrow restriction on the employees' right to resign their union membership, and is within the ambit of the Union's control over its internal affairs. Accordingly, I also would find that the fines imposed pursuant to League Law 13 on the 10 employees who crossed the Unions' picket lines were lawful and not in violation of the proscriptions of Section 8(b)(1)(A) of the Act.

Dated, Washington, D.C. December 16, 1982

HOWARD JENKINS, JR., Member
NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO MEMBERS

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT give force or effect to League Law 13.

WE WILL NOT impose fines and other penalties upon former members for conduct in which they engaged after resigning their membership from the League or its Associations.

WE WILL NOT impose such fines and other penalties upon former members for conduct in which they engaged after resigning their membership, as conditions of regaining union membership under the provisions of a valid union-security clause, and WE WILL NOT attempt to cause employers to seek employees' compliance therewith.

WE WILL NOT cause or attempt to cause employers to discharge or otherwise discriminate against employees who have not complied with the terms of a union-security agreement without first adequately informing employees of their obligations under said agreement.

WE WILL NOT threaten employees with physical harm, property damage, a loss of pension benefits, or any other reprisals for working during the course of a sanctioned strike.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of their Section 7 rights, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act.

WE WILL rescind the fines and/or other similar penalties levied against employees who effectively resigned

during the strike and returned to work and will notify them that such fines and penalties have been rescinded.

WE WILL rescind the fine, excessive back dues, and readmission fee imposed upon William Kohl as a condition of his regaining membership in the Beloit Association, and so notify Kohl of such action.

WE WILL expunge from the records of said employees any reference to fines levied against them.

WE WILL notify Atlas Pattern Works, in writing, that we have no objections to the continued employment of employees William Kohl and John Nelson and shall send copies of said letter to the above-mentioned employees.

PATTERN MAKERS' LEAGUE OF NORTH AMERICA, AFL-CIO, and ITS ROCKFORD AND BELOIT ASSOCIATIONS

(Labor Organization)

Dated ——— By ———

(For Pattern Makers' League of North America, AFL-CIO)

Dated ——— By ———

(For Beloit Association)

Dated ——— By ———

(For Rockford Association)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Savings Center Tower, 16th Floor, 411 Hamilton Avenue, Peoria Illinois 61602, Telephone 309-671-7081.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

Case No. 33-CB-1132

PATTERN MAKERS' LEAGUE OF NORTH AMERICA, AFL-CIO, AND ITS ROCKFORD AND BELOIT ASSOCIATIONS

and

ROCKFORD-BELOIT PATTERN JOBBERS ASSOCIATION

Lynne E. Gilfillan, Atty., Peoria, Ill., for the General Counsel.

William B. Peer, Atty., Washington, D.C., for the Respondents.

DECISION

Statement of the Case

GERALD A. WACKNOV, Administrative Law Judge: Pursuant to notice, a hearing with respect to this matter was held before me in Rockford, Illinois, on August 16, 1978. The charge was filed on January 23, 1978 by Rockford-Beloit Pattern Jobbers Association (herein called the Pattern Jobbers Association), and thereafter on March 7, 1978 a complaint and notice of hearing was issued alleging a violation by Pattern Makers' League of North America, AFL-CIO, and its Rockford and Beloit

Associations (herein called the Respondent Unions) of Section 8(b)(1)(A) and 8(b)(2) of the National Labor Relations Act, as amended (herein called the Act). On June 7, 1978, an amendment to the complaint was issued, alleging additional violations of Section 8(b)(1)(A) of the Act, and at the outset of the hearing the complaint was again amended to add an additional similar allegation. Respondents' answers to the complaint and amendments thereto deny the commission of any unfair labor practices.

The parties were afforded a full opportunity to be heard, to call, examine and cross-examine witnesses, and to introduce relevant evidence. Post-hearing briefs have been filed on behalf of General Counsel and Respondents.

Upon the entire record and based upon my observation of the witnesses and consideration of the briefs submitted, I make the following:

Findings of Fact

I. Jurisdiction

The Pattern Jobbers Association is comprised of approximately 11 employer members engaged in the manufacture and sale of patterns for castings, with facilities located throughout the Rockford, Illinois and Beloit, Wisconsin vicinities. The Pattern Jobbers Association exists for the purpose, among others, of engaging in multi-employer collective bargaining with the Respondent Unions. In the course and conduct of their business operations, employer members of the Pattern Jobbers Association, collectively and in some cases individually, annually sell and ship from their various Illinois and Wisconsin facilities finished products valued in excess of $50,000 to points outside the States of Illinois and Wisconsin, and annually purchase and cause to be transferred and delivered to their various Illinois and Wisconsin facilities goods and materials valued in excess of

$50,000 which are transported to said facilities directly from other states. It is admitted and I find that the Pattern Jobbers Association and its employer members are, and have been at all times material herein, employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organizations Involved

It is admitted and I find that Respondent Pattern Makers' League, Respondent Rockford Association, and Respondent Beloit Association are and have been at all times material herein labor organizations within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. *The Issues*

The principal issues raised by the pleadings are (1) whether Respondent Unions violated Section 8(b)(1)(A) of the Act by fining employees for returning to work during the course of a strike, after said employees had been expelled from or had tendered resignations to their respective Respondent Unions; (2) whether Respondent Beloit Association violated Section 8(b)(1)(A) and Section 8(b)(2) of the Act by attempting to cause an employer to discharge employees for their failure to join the Union; and (3) whether Respondent Unions threatened members in violation of Section 8(b)(1)(A) of the Act.

B. *The Facts*

On or about May 5, 1977 the Respondent Rockford and Beloit Associations commenced a strike against the Pattern Jobbers Association and its individual members. The strike ended on or about December 19, 1977 when negotiations culminated in a new collective-bargaining agreement. Between September 11 and December 2, 1977 approximately 11 employees individually tendered written

resignations to their respective Respondent Unions, and thereafter returned to work for their employers.

On September 11, 1977 William Kohl became the first member to tender his resignation. On September 12, 1977, apparently the date Kohl returned to work, he was expelled from membership by Respondent Beloit Association. On September 26, 1977 four additional employees tendered their written resignations, and thereafter the Respondent Unions received letters of resignation from approximately six additional individuals.[1] Apparently, only Kohl was expelled from membership.[2] Pursuant to League Law 13 of the Respondent Pattern Makers' League of North America[3] the remaining resignations were not accepted by the Respondent Unions, and each individual was thereafter notified of this action in writing by letter dated January 26, 1978, which letter also advised that at a special meeting held on January 23, 1978, a substantial fine, approximately commensurate with his earnings, had been levied against him for returning to work during a strike.[4]

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[1] All but two of the letters of resignation are perfunctory in nature, merely advising Respondent Unions of the member's resignation. One letter contains expressions of dissatisfaction with union officers and negotiators, and in another letter the member expresses his continued belief in unions but regretfully states "it has come down to my family and a hardship."

[2] The record is unclear whether employee Lannie McDonald was also expelled.

[3] League Law 13 provides:

> No resignation or withdrawal from an Association, or from the League, shall be accepted during a strike or lockout, or at a time when a strike or lockout appears imminent.

[4] The record does not contain Respondent Beloit Association's rationale for responding to Kohl's resignation letter with immediate explusion, rather than invoking League Law 13 against Kohl, thus prohibiting his resignation.

Employees Kohl and John Nelson both worked for Atlas Pattern Works (herein Atlas). On January 14, 1978 Respondent Beloit Association notified Atlas that Kohl "is not a member of the Collective Bargaining Agreement under Article Union Shop," effective December 19, 1977, which makes union membership mandatory after 30 days of employment under the contract. The letter further states that "His time expires January 19, 1978, please take appropriate action to rectify this situation." And by letter dated February 1, 1978, apparently pursuant to Kohl's request, Respondent Beloit Association furnished Kohl with application forms and advised him that to gain readmission into the union he would be required to pay back dues in the amount of $211, 3 months dues in advance, a $500 readmission fee and "$4,200 for damages due injury the Beloit Association for deserting the strike by returning to work." Kohl submitted an application in March or April 1978, but did not perfect his application by payment of the various amounts. He has not been discharged by his employer.

Nelson began working for Atlas in March 1977, prior to the strike, and never joined the Respondent Beloit Association. He apparently worked during the strike but the record is unclear as to whether or not he first struck and thereafter returned to work. On January 17, 1978 Respondent Beloit Association sent a similar letter to Atlas also advising in identical language that Nelson had not complied with the union security clause of the new collective-bargaining agreement, requesting that the employer "take appropriate action to rectify this situation." On the same date, Respondent Beloit Association returned to Nelson a check for union dues which he had previously submitted, stating, "Since you are not a member of this Association [the Union] can not accept any payment from you for dues you don't owe." Donald L. Hansen, business agent of Respondent Beloit Association, testified that neither he nor any union steward or official notified Nel-

son of his obligation to join the Union under the terms of the collective-bargaining agreement or that his discharge would be requested absent compliance therewith. According to Hansen, Nelson's application for membership was approved in early February, 1978 after the payment of the appropriate admittance fee and dues requirements for new members.

League Law 13 became embodied in the laws of Respondent Pattern Makers' League on October 1, 1976, after being ratified in August 1976 by the members of the various associations, including the members of Respondent Unions herein, pursuant to appropriate notice procedures. Respondents' representatives testified that League Law 13 became necessary in order to preclude defections from membership which, during the course of numerous prior strikes, caused substantial harm to the League and its members. Thus, the return to work of former members during the course of strikes resulted in the inability to negotiate successor contracts, the defunctness of associations, and the acceptance of substandard terms in collective-bargaining agreements.

According to unrebutted testimony, 43 members initially participated in the instant strike, and each was paid strike benefits while engaging in strike activity, primarily picketing, receiving between $125-$150 per week in benefits.[5] Hansen further testified that all members are required to take an Oath of Membership obligating them to adhere to the "Constitution, Laws, Rules and Decisions" of the League and its associations; all members, including those who later tendered their resignations, received due notice and all but one attended the strike vote which was conducted by secret ballot; and,

[5] However, Pattern Makers' League Law 35, clause 3, states that the monetary assistance benefit for strikers shall be only $40 per week. There is no record evidence clarifying this apparent discrepancy.

as a direct result of the defection of approximately 25 percent of the initial strikers, the strike not only was prolonged but it became necessary to accept a contract embodying substandard wages and benefits.

A joint meeting of Respondent Unions was held in September 1977 [6] and was attended by about 50-60 members. Employee Donald Carlson testified that during a question and answer session a question was asked regarding what would happen should an employee cross the picket line and return to work. During the course of the ensuing and sometimes intemperate discussion the general president of Respondent Pattern Makers' League, Charles Romelfanger, stated that "There has been instances where people crossing picket lines have ended up with broken arms and broken legs from doing such." During further discussion regarding an employee's pension, International Vice President Jack Gabelhausen mentioned a prior strike situation elsewhere, advising that a member had been either suspended or had resigned during the strike and had thereafter applied to get back in the Union. Gabelhausen went on to state that the individual had been assessed a fine of $15,000, and that until such a fine was paid his pension would decrease year by year until nothing was left of it.[7]

Employee David Darling testified that during the course of the aforementioned meeting Walter Bunk, financial secretary and business manager of Respondent Rockford Association, was asked what would happen if somebody crossed the picket line and returned to work. Bunk said, "Well, it has been known that some car and house windows have been broken." Darling asked if Bunk's re-

[6] The precise date of the meeting is unclear.

[7] Gabelhausen admitted stating that crossing a picket line and "possibly creating a non-union shop" could ultimately effect employees pensions.

marks constituted a threat and Bunk replied, "Take it for what it is worth." [8]

Employee Fred Bull, then an executive board member of Respondent Beloit Association, testified that at the Joint Executive Board meeting immediately following the aforementioned September 1977 general membership meeting, Romelfanger, who was asked what would happen if other employees crossed the picket line, replied to those present, including 12 employees, that he had known it to happen that sometimes employees could end up with broken arms or legs. Also, Bull testified that at another Executive Board meeting on October 10 or 11, 1977 Gabelhausen said, "For every day that these men work in non-union shops, they would lose a day of their pensions."

C. *Analysis and Conclusions*

In *Local 3184, United Automobile, Aerospace, Agricultural Implement Workers (Ex-Cell-O Corporation)*,[9] the Board summarizes the applicable law governing a union's fining of members for returning to work during the course of a strike as follows:

> Under the Supreme Court's *Granite State* decision,[10] these employees were bound to observe the strike for its duration merely by virtue of their status as union members at the strike's inception, and their return to work was protected by Section 7 if they first law-

[8] Bunk admitted that he may have mentioned that windows are broken and cars damaged during the course of strikes, but testified that these statements were not uttered as threats. Similarly, Bunk stated that Romelfanger mentioned "broken arms . . . things like that" but only in the context of describing what sometimes occurs during a strike, and not in a threatening manner.

[9] 227 NLRB 1045.

[10] *N.L.R.B.* v. *Granite State Joint Board, Textile Workers Union of America, Local 1029, AFL-CIO (International Paper Box Machine Co.)*, 409 U.S. 213 (1973).

> fully resigned. If they had not resigned and therefore were still union members at the time they returned to work, they would have remained within the ambit of the Union's control.[29] Thus, the exercise of the Section 7 right to return to work during a strike which had commenced while an employee was a union member is restricted to the extent that the member must first resign.

[29] *N.L.R.B.* v. *Allis-Chalmers Manufacturing Co.*, 388 U.S. 175 (1967).

The Board majority in *Ex-Cell-O* found it unnecessary under the circumstances therein to "rule on the question of what, if any, provision in a union's constitution or by-laws limiting the time or manner of resignation would pass muster under the Act," but enunciated certain standards which must be met in order to provide the mandatory "reasonable accomodation" between the often conflicting interests of the union and its members during a strike. Thus, the Board majority in interpreting and applying Supreme Court decisions states that any rule imposing restraints on members' rights to resign during a strike must be precisely tailored to the union's needs and therefore no broader than necessary to serve the union's legitimate interests, and must accord "weight to the competing considerations which may *necessitate* resignation during a strike," such as economic hardship.[11] [Emphasis supplied.]

There is no contention by the General Counsel that League Law 13 was improperly enacted or that the mem-

[11] See *Granite State Joint Board, supra; Scofield* v. *N.L.R.B.*, 394 U.S. 423. See also, *Local Lodge No. 1994, International Association of Machinists and Aerospace Workers, AFL-CIO (O.K. Tool Company, Inc.)*, 215 NLRB 651; *General Teamsters Local 439, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Loomis Courier Service, Inc.)*, 237 NLRB No. 34.

bers who tendered their resignations were unaware of the restrictions on resignation imposed therein. While there are various infirmities inherent in League Law 13 or in the failure of the Respondent Unions to uniformly apply it to all members who tendered their resignations,[12] it is clear that this Law fails to comply with the Board's standard enunciated in *Ex-Cell-O* that such a provision

[12] Thus, it appears the Law would prohibit resignation or withdrawals during strikes by members who are leaving the industry or who may have secured jobs with other non-struck employers, and would further prohibit resignation even if the strike were unprotected. See *Communications Workers of America, AFL-CIO, Local 1127 (New York Telephone Company)*, 203 NLRB 258. Further, the language precluding resignations when a strike "appears imminent" is so vague and susceptible to such varying interpretation as to severely limit the statutory right of members to resign even prior to a strike vote and possibly even prior to the commencement of negotiations. Such indefinite limitations placed upon an employee's statutory right to resign may run afoul of the Board's requirement that in order for such limitation to be binding a member must have actual knowledge of or have indicated his consent to be bound by his contractual commitment vis-avis the Union. See *Ex-Cell-O Corporation, supra; Loomis Courier Service, Inc., supra.* It would appear that such a requirement presupposes some particularity regarding these commitments so that a member may timely and effectively resign. Compare the constitutional prohibition in *Machinists Local 1327, International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge 115 (Dalmo Victor)*, 231 NLRB No. 115. Moreover, by couching the member's obligation in such uncertain terms, the Union may have breached a fiduciary duty to "deal fairly" with employees whom the Union represents. See *Loomis Courier Service, Inc., supra*, slip opinion p. 7. Finally, the Respondent Unions did not consistently invoke and perhaps waived their "right" to invoke League Law 13. Thus, as noted above, William Kohl was the first member to tender his resignation. He was expelled from membership immediately thereafter, prior to the other individuals involved herein having tendered their resignations. Under such circumstances the remaining employees would quite reasonably believe that, similarly, League Law 13 would not be invoked to prohibit their resignations. Indeed, the record shows no notification to them that their resignations were unacceptable until January 26, 1978, well after the conclusion of the strike and months after the tenders of resignation.

must accord weight to circumstances necessitating resignation during a strike. The blanket prohibition of resignations or withdrawals during strikes embodied in League Law 13 permits of no exceptions or qualifications, obviously according no weight whatsoever to the competing considerations often confronting striking employees. Thus, I find that League 13 is an impermissible encroachment on employees' statutory right to resign union membership and that the fines imposed thereunder are in violation of the Act. *Local 1384 United Automobile, Aerospace, Agriculture Implement Workers (Ex-Cell-O Corporation), supra.* But cf. *Machinists Local 1327, International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge 115 (Dalmo Victor), supra,* and the dissenting opinions therein.

During the course of discussing possible methods of dealing with anticipated resignations of union members President Romelfanger voiced his agreement and elaborated upon the statement of one member, who remarked that some of the men on the picket line could get pretty hostile, adding that it had sometimes happened that strikebreakers end up with broken arms or broken legs. Similar statements were made, in similar contexts, by Vice President Gabelhausen and Business Manager Bunk at various union meetings. Further, it was, at the least, strongly suggested by Gabelhausen that employees would lose a day of pension benefits to which they were entitled for each day they worked during the strike.

I find that the statements attributed to Romelfanger, Gabelhausen and Bunk, were made substantially as witnesses Carlson, Darling and Bull so testified. Regardless of whether the various union officials intended their remarks to be taken as direct threats of reprisal, such statements are reasonably subject to such interpretation, particularly in the context described above.[13] Further,

[13] *American Lumber Sales*, 229 NLRB 414, 416.

no effort was made by any union official to dispel such reasonable beliefs.[14] Moreover, when Bunk was asked whether his remarks concerning broken windows and damage to cars of employees constituted a threat, Bunk replied, "Take it for what it is worth," clearly indicating that indeed such was the case. I find that the aforementioned statements constitute conduct violative of Section 8(b)(1)(A) of the Act as alleged. See *Service Employees International Union Local 254, AFL-CIO*, 218 NLRB 1399; *Progressive Mine Workers of America, District No. 1*, 188 NLRB 489.

The General Counsel submits that the letters from Respondent Beloit Association to Atlas, the employer of Kohl and Nelson, were requests for the discharge of these employees for failure to comply with the union security provisions of the new contract. Further, the General Counsel maintains that by making such a request to the employees' employer Respondent Beloit Association breached a fiduciary duty to deal fairly with the employees affected, which duty, at a minimum, requires that a union inform the employee of his obligations under a union security provision in order that he may protect his job tenure.

Hansen testified that the letters to Atlas regarding Kohl and Nelson were designed to prompt Atlas to, in turn, cause Kohl and Nelson to comply with the contract's union security provisions.[15] The letter regarding Nelson was sent to Atlas 3 days prior to the time that Respondent Beloit Association could have requested his immediate discharge, and was not inconsistent with Hansen's testimony regarding the purposes of the letter. Upon

[14] See *Liberty Nursing Homes, Inc.*, 236 NLRB No. 55, slip opinion pp. 5-6.

[15] The record does not contain the wording of the union security provisions.

the expiration of the appropriate period, the record shows no attempt to cause the discharge of Nelson. Further, the record strongly indicates that Nelson was aware of his obligations; indeed Nelson had previously tendered a check for dues prior to his becoming a member. Most importantly, the job tenure of Nelson was not disrupted in any fashion, and he continued in the employ of Atlas and thereafter became a member of the Respondent Beloit Association. Based upon the foregoing, I find the record evidence insufficient to support the complaint allegation that Respondent Beloit Association unlawfully attempted to cause Atlas to discharge Nelson. Nor does it appear that Respondent Beliot Association breached a fiduciary duty to Nelson.

However, the facts regarding Kohl are quite different. It is not in dispute that Respondent Beloit Association expelled Kohl from membership immediately upon receiving his letter of resignation. Thereafter, Respondent Beloit Association sent a letter to Atlas urging that Kohl comply with the union security provisions of the contract by becoming a member of said Union. However, unlike the treatment of Nelson, Respondent Beloit Association thereupon erected a barrier to Kohl's compliance with the contract requirements by conditioning his membership in the Union upon the payment of substantial sums for back dues obviously imposed for periods during which Kohl had no dues obligation,[16] a readmission fee of $500, and an additional amount of $4,200 for damages. It is clear that all such amounts were imposed as a penalty for conduct in which Kohl was engaged after having effectively resigned his Union membership. Therefore, having conditioned membership, mandatory under a valid union security clause, upon the payment of such apparently unprecedented and excessive amounts and by attempting to cause the employer to seek Kohl's compliance therewith

[16] According to the Laws of the Pattern Makers' League, 3 months advance dues are customarily required of new members.

upon the implicit threat of discharge, Respondent Beloit Association has violated Section 8(b)(1)(A) and 8(b)(2) of the Act.[17] *International Association of Machinists and Aerospace Workers, District No. 71 (Whitaker Cable Corporation)*, 224 NLRB 580; *Local 1936, Brotherhood of Railway, Airline and Steamship Clerks, (NCR Corporation)*, 229 NLRB 243; *Business Machine Technicians and Engineers Section, Brotherhood of Airline and Steamship Clerks, AFL-CIO (NCR Corporation)*, 235 NLRB No. 86.

Conclusions of Law

1. The Pattern Jobbers Association is an employer engaged in commerce within the meaning of Section 2(6) and(7) of the Act.

2. Respondents Pattern Makers' League of North America, AFL-CIO, Rockford Association, and Beloit Association are labor organizations within the meaning of Section 2(5) of the Act.

3. By maintaining as an obligation of membership and by invoking League Law 13 against members, which law unreasonably precludes members' effective resignation during a strike or when a strike appears imminent, Respondents have violated Section 8(b)(1)(A) of the Act.

4. By imposing fines against former members who had duly resigned prior to returning to work during the course of a strike, Respondents have violated Section 8(b)(1)(A) of the Act.

[17] While the complaint alleges only the unlawfulness of the fine, I find that the back dues and excessive readmission fee required of Kohl as a condition of becoming a member of the Union are likewise tantamount to unlawfully imposed fines. Whether Respondent Beloit Association could lawfully impose a reasonable readmission fee based on nondiscriminatory considerations is a matter properly left for the compliance stage of this proceeding. See *Metal Workers' Alliance, Incorporated, (TRW Metals Division, TRW, Inc.)*, 172 NLRB 815.

5. By conditioning admission in the union, under the terms of a union security clause, upon the payment of excessive back dues, an excessive readmission fee and a fine, and concomitantly attempting to cause an employer to seek an employee's compliance therewith, Respondent Beloit Association has violated Section 8(b)(1)(A) and 8(b)(2) of the Act.

6. By threatening employees with reprisals in the form of physical harm or loss of accrued pension benefits, Respondents have violated Section 8(b)(1)(A) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) of the Act.

The Remedy

Having found that the Respondents engaged in certain unfair labor practices, I recommend that they be required to cease and desist therefrom. In order to effectuate the purposes of the Act, I shall also recommend that Respondents Beloit Association and Rockford Association rescind the fines unlawfully imposed, and expunge from the records of said employees any reference to fines levied against them for post-resignation conduct; and that Respondent Beloit Association rescind the other excessive monetary penalties imposed against William Kohl as a condition of his regaining union membership.

Further, I shall recommend that League Law 13 be expunged from the Laws of the Pattern Makers' League of North America. League Law 13 unequivocally prohibits resignations during the course of a strike or when a strike appears to be imminent and, as found herein, is unlawful. As the Law is subject to no lawful interpretation and as it may inhibit employees, unaware of its unenforceability, from exercising their Section 7 rights to resign during the course of or prior to a strike, it appears necessary under the circumstances that League Law 13 be excised from the League's body of laws.

Upon the basis of the foregoing findings of the fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended: [18]

ORDER

Respondents Pattern Makers' League of North America, AFL-CIO, Rockford Association and Beloit Association, shall:

1. Cease and desist from:

(a) Giving force or effect to League Law 13.

(b) Restraining or coercing employees who have resigned from Respondents, by imposing fines on such employees for working during a sanctioned strike.

(c) Threatening employees with physical harm, property damage, a loss of pension benefits, or any other reprisals for working during the course of a sanctioned strike.

(d) Imposing fines and other penalties upon former members for conduct in which they engaged after their effective resignation from Respondent, as conditions of regaining union membership under the provisions of a union security clause, and attempting to cause an employer to seek an employee's compliance therewith.

2. Take the following affirmative action designed to effectuate the purposes of the Act:

(a) Expunge from the Laws of the Pattern Makers' League of North America, AFL-CIO any reference to League Law 13.

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[18] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(b) Rescind the fines levied against employees for their post-resignation activity of working during the course of a strike, and notify said employees that such fines have been rescinded.

(c) Rescind the excessive back dues and readmission fee imposed upon William Kohl as a condition of his regaining membership in the Beloit Association, and so notify Kohl of such action.

(d) Expunge from the records of said employees any reference to fines levied against them for post-resignation conduct.

(e) Post at their business offices and meeting halls copies of the attached notice marked "Appendix." [19] Copies of said notice, on forms provided by the Regional Director for Region 33, after being duly signed by authorized representatives of Respondents, shall be posted by Respondents immediately upon receipt thereof, and shall be maintained by them for 60 consecutive days thereafter in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondents to insure that said notices are not altered, defaced or covered by any other material.

(f) Mail to the Regional Director for Region 33 sufficient signed copies of said notice for posting by employer members of the Rockford-Beloit Pattern Jobbers Association, if the employers are willing, in places where notices to employees are customarily posted. Copies of said notice, to be furnished by the Regional Director, after

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[19] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

being duly signed by Respondents' authorized representatives, shall be returned forthwith to the Regional Director.

(g) Notify the Regional Director for Region 33 in writing within 20 days from the date of this Order, what steps the Respondents have taken to comply herewith.

Dated: NOVEMBER 21, 1978

/s/ Gerald A. Wacknov
GERALD A. WACKNOV
Administrative Law Judge

APPENDIX

JD-(SF)-276-78

NOTICE TO
MEMBERS

[SEAL] [SEAL]

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

WE HEARBY NOTIFY YOU that League Law 13 of the Pattern Makers' League of North America, AFL-CIO, has been found to unlawfully prohibit employees from resigning their membership from the League or its Associations during the course of a strike or when a strike appears imminent.

WE WILL NOT give force or effect to League Law 13 and it will be expunged from the League's body of laws.

WE WILL NOT impose fines and other penalties upon former members for conduct in which they engaged after resigning their membership from the League or its Associations.

WE WILL NOT impose such fines and other penalties upon former members for conduct in which they engaged after resigning their membership, as conditions of regaining union membership under the provisions of a valid union security clause and WE WILL NOT attempt to cause employers to seek employees' complaince therewith.

WE WILL rescind the fines and other similar penalties levied against employees for their post-resignation activity of working during the course of a strike, and notify said employees that such fines and penalties have been rescinded.

WE WILL expunge from the records of said employees any reference to fines levied against them for post-resignation conduct.

WE WILL NOT threaten employees with physical harm, property damage, loss of pension benefits, or any other reprisals for working or returning to work during the course of a sanctioned strike.

PATTERN MAKERS' LEAGUE OF NORTH AMERICA, AFL-CIO, and ITS ROCKFORD AND BELOIT ASSOCIATIONS

(Unions)

Dated _____ By _____

(For Pattern Makers' League of North America, AFL-CIO)

Dated _____ By _____

(For Beloit Association)

Dated _____ By _____

(For Rockford Association)

This is an Official Notice and Must not be Defaced by Anyone

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Savings Center Tower—16th Floor, 411 Hamilton Avenue, Peoria, IL 61602. Telephone Number—(309) 671-7091.

No. 83-1894

In the Supreme Court of the United States

OCTOBER TERM, 1984

PATTERN MAKERS' LEAGUE OF NORTH AMERICA, AFL-CIO, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

REX E. LEE
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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-1894

PATTERN MAKERS' LEAGUE OF NORTH AMERICA, AFL-CIO, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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1. The Board found, inter alia, that petitioner (the Union) violated Section 8(b)(1)(A) of the National Labor Relations Act, 29 U.S.C. 158(b)(1)(A), by fining union members who had resigned from the union and then returned to work during the course of a strike, in violation of a union constitutional provision prohibiting resignations during a strike or lockout or when one appears imminent (Pet. App. 13a). In so finding, the Board relied on its decision in *Machinists Local 1327, International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge 115 (Dalmo Victor)*, 263 N.L.R.B. 984, 986 (1982), enforcement denied, 725 F.2d 1212 (9th Cir. 1984), in which the Board held that "a union rule which limits the

right of a union member to resign only to nonstrike periods constitutes an unreasonable restriction on a member's Section 7 right to resign.'"[1]

2. The court of appeals upheld the Board's decision (Pet. App. 8a). The court stated (Pet. App. 5a-6a (citations omitted)):

> The Section 7 right to refrain from union activities encompasses the right of members to resign from the union. We think that because [the Union's constitutional provision] completely suspends an employee's right to choose not to be a union member and thus no longer subject to union discipline, it frustrates the overriding policy of labor law that employees be free to choose whether to engage in concerted activities.

The court added that while a union had the right to enforce its members' compliance with its rules, that power did not extend to employees' post-resignation activities or to forbidding members from resigning (Pet. App. 7a).

3. The court of appeals correctly held that the Union's restriction on resignation impermissibly trenches on the Section 7 right of employees to refrain from engaging in union activities. However, the decision of the court of appeals is in direct conflict with the decision of the Ninth Circuit in *Dalmo Victor* (725 F.2d 1212 (1984)), which held that a restriction on resignation during a strike is a

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[1]The Board there expressed the view that a rule restricting a member's right to resign for a period not to exceed 30 days after tender would be enforceable (263 N.L.R.B. at 987). Chairman Van de Water and Member Hunter, concurring, were of the view that any restriction on the right to resign was contrary to the Act (*id.* at 987-988). In *International Association of Machinists, Local Lodge 1414 (Neufield Porsche-Audi)*, 270 N.L.R.B. No. 209 (June 22, 1984), the Board adopted the view of the concurrence in *Dalmo Victor* that the Act permits no restriction on the right to resign.

reasonable union rule protected by the proviso to Section 8(b)(1)(A) of the Act.[2] The issue is a recurrent one in the administration of the Act. It is important that this Court resolve the conflict among the circuits to eliminate the uncertainty that now exists regarding the right of employees across the nation to resign from a union in order to return to work for a struck employer.[3]

For these reasons, the Board does not oppose the granting of the present petition.

Respectfully submitted.

REX E. LEE
Solicitor General

WILFORD W. JOHANSEN
Acting General Counsel
National Labor Relations Board

AUGUST 1984

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[2]That proviso permits a union to "prescribe its own rules with respect to the acquisition or retention of [union] membership" (29 U.S.C. 158(b)(1)(A)).

[3]The Ninth Circuit denied the Board's petition for rehearing and suggestion of rehearing en banc in *Dalmo Victor* on July 10, 1984. We intend to file a petition for a writ of certiorari in that case.

(7)

No. 83-1894

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PATTERN MAKERS' LEAGUE OF NORTH AMERICA, AFL-CIO, AND ITS ROCKFORD AND BELOIT ASSOCIATIONS,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD

and

ROCKFORD-BELOIT PATTERN JOBBERS ASSOCIATION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Is the National Labor Relations Board granted the authority by the National Labor Relations Act, as amended, to invalidate provisions in union constitutions and bylaws requiring union members to retain their membership during a strike or lockout or at a time when a strike or lockout appears imminent?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-1894

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On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF FOR PETITIONERS

OPINIONS BELOW

The National Labor Relations Board's decision and order in this case is reported at 265 NLRB 1332, and is reprinted at pp. 9a-44a of the appendix (hereafter "App.") to the petition for a writ of certiorari. The United States Court of Appeals for the Seventh Circuit's opinion and judgment is reported at 724 F.2d 57 and is reprinted at App. 1a-8a.

JURISDICTION

The Seventh Circuit's opinion and judgment were issued on December 21, 1983. On April 10, 1984, Justice Stevens signed an order extending the time for filing a petition for a writ of certiorari to and including May 18, 1984. The certiorari petition was filed that day and was granted on October 1, 1984. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 7 of the National Labor Relations Act ("NLRA"), as amended, 29 U.S.C. § 157, provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) of this Act.

Section 8(b)(1)(A) of the NLRA, 29 U.S.C. § 158(b)(1)(A), provides:

> It shall be an unfair labor practice for a labor organization or its agents—
>
> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 of this Act: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; * * *.

STATEMENT OF THE CASE

A. The Facts

All members of petitioner Pattern Makers' League (hereafter "the League" or "the Union") take an Oath of Membership obligating them to adhere to the Union's "Constitution, Laws, Rules and Decisions." App. 30a. And, League Law 13 provides:

> [N]o resignation or withdrawal from an Association, or from the League, shall be accepted during a strike or lockout, or at a time when a strike or lockout appears imminent. [App. 28a, n.3.]

This amendment to the Union's governing laws was ratified in August 1976 by a membership vote after "appropriate notice procedures" (App. 30a), and became effective in October 1976 (*id.*).

The following year, on May 5, 1977, petitioners Rockford and Beloit Associations (hereafter "the Local Unions") commenced a strike against the Rockford-Beloit Pattern Jobbers Association, a multiemployer association. All members of the Local Unions received notice of, and all but one participated in, the secret ballot vote authorizing the strike. App. 30a. All striking members received between $125 and $150 a week in strike benefits. *Id.* Nonetheless, and notwithstanding both the restriction on resignation contained in League Law 13 and the members' awareness of that restriction,[1] some eleven members sought to resign their union membership during the strike and then returned to work while the strike was still in effect. *Id.* at 27a-28a, 29a-30a. The direct results of their actions, according to unrebutted testimony, was that the strike was prolonged, and

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[1] "There is no contention * * * that the members who tendered their resignations were unaware of the restrictions on resignation imposed [by League Law 13]." App. 33a-34a.

that it became necessary for the Local Unions to accept a contract embodying substandard wages and benefits. *Id.* at 31a.

The strike ended on December 19, 1977. On January 26, 1978, the Unions sent letters to the members who had sought to resign during the strike, informing them that their resignations could not be accepted because those resignations were in violation of League Law 13, and after appropriate proceedings, the strikebreaking members were fined for working for the struck employers. In response those employers, through their association, filed charges with the National Labor Relations Board (hereafter "NLRB" or "the Board"), claiming that the Unions had violated § 8(b)(1)(A) of the National Labor Relations Act, as amended, by imposing those fines.

B. The NLRB Decisions in the Instant Case and in the Companion *Dalmo Victor* Case

After a decision by an Administrative Law Judge, the NLRB, "having determined that this and another case involving the right of a labor organization to impose restrictions on a member's right to resign presented issues of importance in the administration of the National Labor Relations Act" (App. 9a), set both cases for oral argument in tandem on January 16, 1980, before the full Board.

After nearly three years of consideration, the companion case, *Machinists Local 1327 (Dalmo Victor)*, 263 NLRB 984 (1982), was decided by the Board on September 10, 1982, with the decision in the instant case following on December 16, 1982. In both cases the Board held that the respondent unions had committed unfair labor practices by fining members who sought to resign their membership and returned to work during a strike, even though the union's constitution or laws expressly restrict resignations during strike periods.

In *Dalmo Victor*, four of the five Board members held, in two separate, lengthy, and somewhat divergent opinions, that a union rule permitting union members to resign only if the resignations are submitted at least 14 days preceding the commencement of a strike is unenforceable.[2]

Members Fanning and Zimmerman found that "a union rule which limits the right of a union member to resign only to nonstrike periods constitutes an unreasonable restriction on a member's Section 7 right to resign." 263 NLRB, at 986. However, "find[ing] it salutary to set forth a general rule for the behavior of parties in the area," these two Board Members decreed that unions ordinarily may prohibit their members from resigning only "for a period not to exceed 30 days after the tender of such a resignation." *Id.*, at 987.

Chairman Van de Water and Member Hunter agreed that the Machinists had committed an unfair labor prac-

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[2] The rule at issue in *Dalmo Victor* provides: "Resignation shall not relieve a member of the obligation to refrain from accepting employment at the establishment for the duration of the strike or lockout within 14 days preceding its commencement." The NLRB originally held that this provision is not a restriction on resignation during the strike period but, instead, a restriction on postresignation conduct, and found an unfair labor practice on that theory. *Machinists Local 1327 (Dalmo Victor)*, 231 NLRB 115 (1977). On review the Ninth Circuit rejected the Board's construction of the clause as "hypertechnical," concluding that the provision "is a restriction on a member's right to resign." *NLRB v. Machinists Local 1327*, 608 F.2d 1219, 1222 (9th Cir., 1979). Because the Board majority had not reached the question whether a union constitutional provision restricting resignation would be valid, the Ninth Circuit remanded the case to the Board. Pursuant to the remand, the Board accepted as the law of the case the Ninth Circuit's construction of the Machinists' provision (263 NLRB, at 984 n.4), and proceeded to decide "whether a union can, pursuant to an internal rule prohibiting resignations during a strike or within 14 days preceding its commencement, lawfully impose a fine on members who tendered resignations and returned to work during the course of a strike" (*id.* at 984).

tice by fining its resigning members, but challenged their colleagues' 30-day rule as "an arbitrary exercise of this Board's authority" that represented "a transparent effort to achieve a legislative result rather than a reasoned legal conclusion." 263 NLRB at 987. Those two Board Members concluded that *any* restriction imposed by a union upon its members' right to resign would be *per se* unreasonable, and that any fine or any other discipline "premised" on such a restriction would constitute an unfair labor practice under § 8(b)(1)(A). *Id.*, at 988.

Member Jenkins dissented in *Dalmo Victor*, concluding that the Machinists prohibition of resignations during a strike, or within the 14 days preceding a strike, constitutes a reasonable and valid internal union rule explicitly protected by the proviso to § 8(b)(1)(A). 263 NLRB at 994. In his view,

> [the union] was entitled to levy fines against the Charging Parties as a means of enforcing a lawful constitutional provision governing retention of membership, a subject expressly excluded from the scope of Section 8(b)(1)(A) by the proviso thereto, and within the ambit of a union's control over its internal affairs. [263 NLRB at 994.]

In the instant case, the Board wrote very briefly on the pertinent issue, adopting both the result and rationale of the *Dalmo Victor* case:

> League Law 13 suffers from the same infirmity as did the rule in *Dalmo Victor*. While League Law 13 apparently provides for resignations during nonstrike periods, it clearly prohibits any such resignations once a strike has begun or when one "appears imminent." Under the Board's holding in *Dalmo Victor*, League Law 13 can be considered as neither valid nor enforceable. [App. 13a.] [3]

[3] There were other, separate unfair labor practice charges resolved in the Board decision and order in this case. None of these other Board determinations were contested in the court below (App. 2a-3a, n.1), and no question concerning these holdings is presented to this Court. *See* p. i *supra*.

Member Jenkins filed a dissenting opinion in *Pattern Makers*, as he had in *Dalmo Victor*, in which he stated:

> I would find that League Law 13, as applied herein, is a reasonable and narrow restriction on the employees' right to resign their union membership, and is within the ambit of the Union's control over its internal affairs. Accordingly, I also would find that the fines imposed pursuant to League Law 13 on the 10 employees who crossed the Union's picket lines were lawful and not in violation of the proscriptions of Section 8(b)(1)(A) of the Act. [App. 22a.]

C. The Court of Appeals Decisions in the Instant Case and in the Companion *Dalmo Victor* Case

The Unions sought review of the Board's decision herein, insofar as that decision invalidated League Law 13, in the United States Court of Appeals for the Seventh Circuit. That court upheld the Board's ruling.

The Seventh Circuit began from the premise that the instant case is one "present[ing] an apparent conflict between two fundamental policies underlying the NLRA," which that court identified as the right of employees to refrain from collective bargaining activities and the right of unions to regulate their internal affairs without congressional or court interference. App. 3a-4a. The court below while acknowledging (App. 1a) that this Court has twice explicitly *left open* the question whether union constitutional provisions restricting resignations during a strike period are enforceable under the NLRA viewed this Court's decisions as establishing that "[a]n employee's right to resign cannot be overridden by union interests in 'group solidarity and mutual reliance'." App. 6a.

Machinists Local 1327 sought review of the Board's decision in the companion *Dalmo Victor* case in the United States Court of Appeals for the Ninth Circuit. That court granted the petition for review and denied the Board's cross petition for enforcement. *Machinists Local 1327 v. NLRB*, 725 F.2d 1212 (9th Cir., 1984).

Unlike the Board and the court below, the Ninth Circuit viewed the new rule against union restrictions on resignations during a strike as one which "frustrates federal labor policy in important respects." 725 F.2d at 1215. Relying on *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, the Ninth Circuit stressed that:

> [N]either Congress nor the [Supreme] Court gave individual members license to avoid union rules designed to protect the welfare of the bargaining unit. [This is why] Congress • • • enacted the proviso to § 8(b)(1)(A), which reserves the unions the power to make reasonable rules regarding the retention and acquisition of membership. [725 F.2d, at 1216.]

Again, unlike the Board and the court below, the Ninth Circuit, while recognizing that "'the power of the union over the member is certainly no greater than the union-member contract'" (725 F.2d at 1218, *quoting NLRB* v. *Textile Workers*, 409 U.S., 213, 217), maintained that, under the § 8(b)(1)(A) proviso, the member's obligation is, under the present circumstances, also no *less* than the obligation the union constitution and bylaws establish:

> [T]he terms of the contract before us condition the member's right to resign on his promise not to break the strike. If the member can escape his obligations by pleading, when the union attempts to collect the fine, that he is no longer part of the union, then the terms of this contract mean little. [725 F.2d at 1218.]

D. The NLRB Decision in the *Neufeld Porsche-Audi* Case

Subsequent to the Seventh Circuit decision in this case and the Ninth Circuit decision in the *Dalmo Victor* case, the Board, in *Machinists Local 1414 (Neufeld Porsche-Audi, Inc.)*, 270 NLRB No. 209 (June 22, 1984), returned to the question presented here. In that decision, three members of the Board (Chairman Dotson and Members Hunter and Dennis) stated, "we hold that the [union's] restriction on resignations [at issue], *as well as any other restriction a union may impose on resignation, is invalid* • • •." 270 NLRB No. 209, Sl. Op. at 5-6; emphasis added. Member Zimmerman adhered to the position he and Member Fanning had stated in *Dalmo Victor*. *Id.* at 22-23 and *see* p. 5, *supra*.

The Board majority, while noting that this Court has not "expressly address[ed] a union's authority to restrict resignations" (270 NLRB No. 209, Sl. Op. at 6) believed that the "principles embodied" in this Court's decisions "compel the conclusion that • • • *any restrictions placed by a union on its member's right to resign* • • • *are unlawful*" (*id.* at 9; emphasis added). Those Board members relied in particular on the proposition that "when a union seeks to delay or otherwise impede a member's resignation, it directly impairs the employee's Section 7 right to resign or otherwise refrain from union or other concerted activities" (*id.* at 10-11).

SUMMARY OF ARGUMENT

To make out the § 8(b)(1)(A) unfair labor practice found by the NLRB here it is necessary to show, in the statutory language, not only that the employees in question were "exercis[ing] • • • rights guaranteed in section 7," *but also* that the union "restrain[ed] or coerc[ed]" the employees in the exercise of those rights *and further* that the union's actions are *not* protected by § 8(b)(1)(A)'s proviso which states that the foregoing prohibition "shall not impair the right of a labor organization to prescribe its own rules with respect to

the acquisition or *retention* of membership therein," (emphasis supplied).

A. The plain words of § 8(b)(1)(A)'s proviso read naturally clearly encompass the union resignation rule at issue here. A rule providing that a union member is required to continue his membership during a strike is surely a rule "with respect to the • • • retention of membership;" indeed, it is more clearly such a rule than the only other kind of rule to which the phrase could possibly refer—a rule providing that under certain circumstances a union member will be expelled, *viz.*, deprived of continued membership.

The legislative history not only supports this reading of the proviso, but forcefully negates the proposition that Congress intended by §§ 7 and 8(b)(1)(A) to outlaw union rules restricting resignation from membership.

Section 8(b)(1)(A) and its proviso originated in the Senate in the course of the floor debate on the bill eventually enacted as the Labor Management Relations Act of 1947. Senator Ball, a sponsor of § 8(b)(1)(A), agreed to accept an amendment adding the proviso in its present terms proposed by Senator Holland. Their statements in describing the purpose of the proviso accord with its literal language by confirming that the proviso is intended to cover "rules of membership either with respect to beginning or terminating membership" (Senator Holland) and "the requirements and standards of membership itself" (Senator Ball). Union resignation rules are, on any view, a paradigm example of rules "with respect to • • • terminating membership" and rules on "the requirements • • • of membership itself."

The LMRA also added to § 7 of the original NLRA, the provision enumerating the "concerted activities" protected by the Act, the phrase "and shall also have the right to refrain from any or all such activities • • •." This addition originated in § 7(a) of the House of Representatives Bill. Its proponents explained its purpose

as simply being to assure that the "Board will be prevented from compelling employees to exercise [the] rights [stated in § 7 of the original NLRA] against their will". This limiting explanation is buttressed by the House Bill's structure.

Section 7 of the House Bill was divided into a subsection (a) granting rights to "employees" generally and a subsection (b) granting rights concerning the "affairs of the organization" to "members of any labor organization." This, like the sponsors' statement of the point of the right to refrain amendment, shows that the sponsors of the House Bill did *not* intend through § 7(a) to regulate the relationship between unions and their members by creating a body of membership rights.

What the language, structure and explanations of §§ 7(a) and 7(b) of the House Bill evidence, the language, structure and explanations of §§ 8(b) & 8(c) confirm. Section 8(c), which related back to § 7(b), would have made it an unfair labor practice for unions to "interfere with, restrain, or coerce employees in the exercise of rights granted by § 7(b)," rights, *inter alia*, "to have the affairs of the organization conducted in a manner that is fair to its members." Section 8(c)(4), in terms, would have made it an unfair labor practice for a union "*to deny to any member the right to resign from the organization at any time.*"

Thus, the Board's construction of the right to refrain included in § 7 of the LMRA attributes to its predecessor provision—the House Bill's § 7(a) (and its companion § 8(b))—a meaning which encompasses all of the subject matter of §§ 7(b) and 8(c) of the House Bill, a meaning that phrase will bear only on the wholly implausible assumption than its sponsors intended §§ 7(b) and 8(c) of the House Bill to be redundant.

The House-Senate Conferees who put together the final version of the LMRA added to § 7 of the original NLRA the right to refrain language from § 7(a) of the House Bill and added to the Act the Senate Bill's § 8(b)(1)(A)

including its proviso; the Conference Bill did not include any of the other House amendments to § 7, the House Bill's § 8(b)(1) or any part of the House Bill's § 8(c).

Senator Taft explained that the effect of adopting the "right to refrain" language, "[t]aken in conjunction with section (b)(1) of the conference agreement," excludes "many forms and varieties of concerted activities" from the protections of the Act. The statement of the House Managers provides the same explanation. And the House Managers acknowledged that, with one exception, § 8(c) of the House Bill had been rejected in the Conference.

Given all of the foregoing—and especially the elimination of § 8(c) of the House Bill including its § 8(c)(4) —the governing precedent is *Labor Board v. Drivers Local Union*, 362 U.S. 274, 289, where this Court rejected an earlier Board attempt to read into § 8(b)(1)(A) a union unfair labor practice stated in the House Bill that the 1947 Congress did not choose to enact into law:

> Plainly * * * the [union's] conduct in the instant case would have been prohibited if the House bill had become law.
>
> But the House conferees abandoned the House bill in conference and accepted the Senate proposal. * * *

B. In *NLRB v. Textile Workers*, 409 U.S. 203 and again in *Machinists & Aerospace Workers v. NLRB*, 412 U.S. 84, the Court, in order to determine whether a union member has "lawfully resign[ed]" from the union where its constitution and bylaws are silent on the subject of voluntary resignation, looked to the "law which normally is reflected in our free institutions" that defines the "right of the individual * * * to resign from associations." As the Court stated, under that body of law, in that circumstance, "members [are] free to resign at will."

Since, as we have shown, the § 8(b)(1)(A) proviso preserves intact "the right of a labor organization to prescribe its own rules with respect to the * * * retention

of membership," the inquiry here reduces to that undertaken in *Textile Workers* and *Machinists*: whether under the common law of associations the resignations here were lawful.

The common law decisions establish that an association may place restrictions on its members' right to resign where such restrictions are designed to further a basic purpose for which the association was formed. The Union's resignation rule is, of course, precisely that type of restriction. The Pattern Makers promulgated that rule to protect the common interest of maintaining a united front during the most critical time a union faces—an economic strike. Each member joined the union, or retained his membership when free to resign, with the understanding that he was agreeing not to resign during a strike or when a strike appeared imminent, and with the further understanding that other members were agreeing to be similarly bound.

ARGUMENT

The National Labor Relations Board's decision herein outlines the nature of this case and the positions of its General Counsel, which the Board adopted, and of the respondent Unions with regard to the Board's authority to invalidate a rule embodied in a union's constitution or bylaws defining or limiting the circumstances under which a union member may resign his membership:

> The principal issue in this case involves the question of whether [the Unions] violated Section 8(b)(1)(A) of the Act by imposing fines on members who tendered resignations and returned to work during the course of a strike in apparent contravention of [the Unions'] rule [stated in League Law 13] prohibiting resignations during a strike or lockout or when one appeared imminent.
>
> * * * *
>
> The General Counsel contends that League Law 13 unlawfully intrudes into the rights guaranteed to employees by Section 7 of the Act and that, conse-

> quently, the fines imposed thereunder are unlawful and in violation of Section 8(b)(1)(A) of the Act. [The Unions], on the other hand, assert that League Law 13 constitutes a valid exercise of their right to enact internal union rules governing the acquisition and retention of membership as set forth in the proviso to Section 8(b)(1)(A). They therefore argue that the fines imposed on those individuals who resigned and returned to work during the strike in violation of such rule were lawful. [App. 10a-11a.]

To make out the § 8(b)(1)(A) unfair labor practice found by the Board here it is necessary to show, in the statutory language, not only that the employees in question were "exercis[ing] * * * rights guaranteed in section 7," *but also* that the union "restrain[ed] or coerc[ed]" the employees in the exercise of those rights *and further* that the union's actions are *not* protected by § 8(b)(1)(A)'s proviso stating that the foregoing prohibition "shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or *retention* of membership therein," (emphasis supplied). *See* p. 2 *supra* (setting out the statutory language).

It is our position that the office of the § 8(b)(1)(A) proviso is to preserve for the unions covered by the NLRA the right recognized in the common law of associations—"the law which normally is reflected in our free institutions" (*NLRB v. Textile Workers*, 409 U.S. 213, 216)—to prescribe in the union's constitution or bylaws, which establish "the contractual relationship between union and member" (*id.* at 217), "its own rules with respect to the * * * retention of membership" including the resignation rule at issue here. Congress' purpose in adding the proviso was to make it manifest that § 8(b)(1)(A) does *not* grant the Board the authority to "impair" this basic right of all membership associations.

1. The issue posed here is framed by what this Court has decided and what the Court has left open in *NLRB*

v. Allis-Chalmers Mfg. Co., 388 U.S. 175 and its progeny. The most recent of these decisions are *NLRB v. Boeing Co.*, 412 U.S. 67, and its companion case *Machinists & Aerospace Workers v. NLRB*, 412 U.S. 84. The *Boeing* and *Machinists* opinions in concise terms state the relevant background principles.

In *Boeing* the Court first summarized its prior holdings on the meaning of § 8(b)(1)(A):

> We have previously held that § 8(b)(1)(A) was not intended to give the Board power to regulate internal union affairs, including the imposition of disciplinary fines, with their consequent court enforcement, against members who violate the unions' constitutions and bylaws. *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967); *Scofield v. NLRB*, 394 U.S. 423 (1969). In *Allis-Chalmers* we held that court enforcement of fines ranging from $20 to $100 for crossing picket lines did not "restrain or coerce" employees within the meaning of the Act. And in *Scofield* we held that the union did not violate the Act in imposing fines of $50 and $100 on members for violating a union rule relating to production ceilings. [412 U.S. at 71-72.]

And the *Boeing* Court then noted that "[i]n deciding these cases, the Court several times referred to the unions' imposition of 'reasonable' fines" and that the "Company contends, not illogically, that the Court's use of the adjective 'reasonable' was intended to suggest to the Board that an unreasonable fine would amount to an unfair labor practice." 412 U.S. at 72. But the Court rejected that contention: "Given the rationale of *Allis-Chalmers* and *Scofield*, the Board's conclusion that § 8(b)(1)(A) of the Act has nothing to say about union fines of this nature, whatever their size, is correct." 412 U.S. at 74.

In the *Machinists* case the Court summarized and followed its ruling in the *Textile Workers* case:

> In *NLRB v. Textile Workers*, 409 U.S., at 217, we held that "[w]here a member lawfully resigns from

a union and thereafter engages in conduct which the union rule proscribes, the union commits an unfair labor practice when it seeks enforcement of fines for that conduct." Since in that case there was no provision in the Union's constitution or bylaws limiting the circumstances in which a member could resign, we concluded that the members were free to resign at will and that § 7 of the Act, 29 U.S.C. § 157, protected that right to return to work during a strike which had been commenced while they were union members. The Union's imposition of court-collectible fines against the former members for such work was, therefore, held to violate § 8(b)(1)(A).

> *Here, as in Textile Workers, the Union's constitution and bylaws are silent on the subject of voluntary resignation from the Union. And here, as there, we leave open the question of the extent to which contractual restriction on a member's right to resign may be limited by the Act.* Since there is no evidence that the employees here either knew of or had consented to any limitation on their right to resign, we need "only to apply the law which normally is reflected in our free institutions—the right of the individual to join or to resign from associations, as he sees fit 'subject of course to any financial obligations due and owing' the group with which he was associated." *Textile Workers, supra*, at 216. [412 U.S. at 87-88; emphasis added; footnotes omitted.]

In sum, under *Allis-Chalmers* and *Boeing*, it is *not* an unfair labor practice for a union to adopt a rule prohibiting "full union members" from engaging in strikebreaking activity, to fine members who violate that rule and to bring suit to collect such fines in the state courts;[4]

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[4] In *Allis-Chalmers* the Court noted:

> It is clear that the fined employee[] involved herein enjoyed full union membership * * * [and] "had by his actions become a member of the union for all purposes . . . ." * * * Whether [§ 8(b)(1)(A)'s] prohibitions would apply if the locals had imposed fines on members whose membership was in fact limited to the obligation of paying monthly dues is a question not before us and upon which we intimate no view.[37]
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> * * * *
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> [37] Under § 8(a)(3) the extent of an employee's obligation under a union security agreement is "expressly limited to the payment of initiation fees and monthly dues . . . 'Membership' as a condition of employment is whittled down to its financial core." *Labor Board v. General Motors Corp.*, 373 U.S. 734, 742. [388 U.S. at 196-197 & n.37.]

under *Textile Workers* and *Machinists*, it *is* an unfair labor practice for a union that has adopted an anti-strikebreaking rule to impose "court-collectible fines" against a member who has "lawfully resign[ed]" from membership for his actions after resignation (412 U.S. at 87-88); and under *Textile Workers* and *Machinists*, which "apply the law * * * normally reflected in our free institutions," where there is no provision in the union's constitution or bylaws "limiting the circumstances in which a member could resign," members are "free to resign at will" (412 U.S. at 87-88).

While this Court has settled that much, the Court has also twice chosen to "leave open the question of the extent to which contractual restriction on a member's right to resign may be limited to the Act". *Machinists*, 412 U.S. at 88; *Textile Workers*, 409 U.S. at 217. That is the question presented by this case.

The Board's answer to that question is that § 8(b)(1)(A) of the Act invalidates the "contractual restriction" stated in League Law 13 and, indeed, as the Board's recent comprehensive restatement of its position makes clear, "any restriction[] placed by a union on its member's right to resign" (*Neufeld Porsche-Audi*, 270 NLRB No. 209, Sl. Op. 9). In its *Neufeld Porsche-Audi* opinion, the Board does not discuss, much less analyze, the plain language of the proviso to § 8(b)(1)(A) or the legislative history of the Labor Management Relations Act of 1947 which both added to § 7 of the original NLRA an express "right to refrain from any or all [of

the concerted] activities" enumerated in that section, and added to the Act § 8(b)(1)(A) and its proviso. We therefore begin by reviewing these governing materials in interpreting an Act of Congress.

2. The plain words of § 8(b)(1)(A)'s proviso read naturally clearly encompass union resignation rules of the kind here at issue. A rule providing that a union member is required to continue his membership during a strike is surely a rule "with respect to the • • • retention of membership;" indeed, it is more clearly such a rule than the only other kind of rule to which the phrase could possibly refer—a rule providing that under certain circumstances a union member will be expelled, *viz.*, deprived of continued membership. In dryly literal terms, expulsion rules concern not "retention of membership" but the inverse—"nonretention (loss) of membership." The point for present purposes, however, is that in terms of a fair reading of the statutory language, rules requiring continued membership and rules denying continued membership are both well within the normal meaning of the phrase "rules with respect to the • • • retention of membership."

3. The House of Representatives acted first on the proposals to amend the original NLRA that were considered by the 1947 Congress. But both § 8(b)(1)(A) and its proviso are the Senate's product and we therefore turn first to the events in that body.

Section 7 of S. 1126, 80th Cong., 1st Sess., the Senate Committee on Labor and Public Welfare Bill, as reported, tracked § 7 of the original NLRA and the Senate Committee Bill's § 8(b)(1), went only so far as to make it an unfair labor practice for a labor organization to "interfere with, restrain or coerce an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances" (the unfair labor practice eventually enacted as § 8(b)(1)(B)

of the Act). National Labor Relations Board, Legislative History of the Labor Management Relations Act of 1947, 109, 112 (G.P.O. 1948) (hereafter "Leg. Hist.").[5]

In their supplemental views attached to the Senate Committee Report, Senators Taft, Ball, Donnell and Jenner proposed broadening § 8(b)(1) by adding after "coerce" the phrase "employees in the exercise of the rights guaranteed in section 7." S. Rep. No. 105, 80th Cong., 1st Sess., 50; Leg. Hist. 456. During floor consideration of the Senate Committee Bill, Senator Ball did move that amendment. Leg. Hist. 1018. And, during the Senate's consideration of his amendment, Senator Ball agreed to two amendments to the proposed § 8(b)(1)(A), one by Senator Ives striking the words "interfere with" and another by Senator Holland adding the proviso in its present terms. Leg. Hist. 1138-1141.

In offering his amendment to the Ball amendment in a form consistent with the Senate's parliamentary rules —an earlier attempt having been out of order for reasons having nothing to do with the proviso's substance— Senator Holland, after reading the suggested statutory language, stated:

> In other words, if accepted by the sponsors of the pending amendment, the inserted words would make it clear that the pending [Ball] amendment would have *no application to or effect upon the right of a labor organization to prescribe its own rules of membership either with respect to beginning or terminating membership.* I understand that the amendment so offered meets with no serious objection of the part

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[5] The Senate Committee Bill created five union unfair labor practices. In addition to its § 8(b)(1) just described, § 8(b)(2) of that bill prohibited union efforts to persuade an employer to discriminate against an employee, § 8(b)(3) imposed a duty to bargain in good faith, § 8(b)(4) dealt with the secondary boycott and § 8(b)(5) concerned breaches of collective bargaining agreements. Leg. Hist. 112-114.

> of the sponsors of the pending amendment. [Leg. Hist. 1141; emphasis added.]

In his earlier procedurally imperfect attempt to introduce the amendment, Senator Holland had said:

> I have had some discussion with the Senator from Minnesota [Mr. BALL] and the Senator from Ohio [Mr. TAFT] and with other Senators in reference to the meaning of the pending [Ball] amendment and as to how seriously, if at all, it would affect the internal administration of a labor union.
>
> Apparently it is not intended by the sponsors of the amendment to affect at least that part of the internal administration which has to do with the admission or the expulsion of members, that is with the questions of membership. So I offer an amendment as a substitute for the amendment of the Senator from Minnesota [adding the § 8(b)(1)(A) proviso in its present terms]. [Leg. Hist. 1139.]

In accepting the perfected Holland Amendment, Senator Ball responded:

> I merely wish to state to the Senate that the amendment offered by the Senator from Florida is perfectly agreeable to me. It was never the intention of the sponsors of the pending amendment to interfere with the internal affairs or organization of unions. The amendment of the Senator from Florida makes that perfectly clear. I am willing, on behalf of myself and the other sponsors of the amendment, to accept the amendment offered by the Senator from Florida and, if it is necessary, so to modify and perfect my own amendment. [Leg. Hist. 1141.]

At a later point in the debate, Senator Ball, in describing his amendment and the "modification" to that amendment made by Senator Holland, stated:

> That modification is designed to make it clear that we are not trying to interfere with the internal affairs of a union which is already organized. All we are trying to cover is the coercive and restraining acts of the union in its effort to organize unorganized employees. However, the proviso would not go so far as to permit the union to adopt rules authorizing its agents to threaten and coerce nonunion members in an effort to persuade them to join. *The modification covers the requirements and standards of membership in the union itself.* [Leg. Hist. 1200; emphasis added.]

So far as our researches show, the foregoing are the only direct comments on the meaning and effect of the § 8(b)(1)(A) proviso. And, the sponsors' statements are consonant with the provision's literal language protecting union rules "with respect to the acquisition or retention of membership." Those statements confirm that the proviso is intended to cover "rules of membership either with respect to beginning or terminating membership" (Senator Holland) and "the requirements and standards of membership itself" (Senator Ball). Union resignation rules are, on any view, a paradigm example of rules "with respect to the * * * retention of membership," rules "with respect to * * * terminating membership" and rules on "the requirements * * * of membership itself."[*]

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[*] The question of the extent to which § 8(b)(1)(A)'s terms "restrain or coerce," standing alone, cover union discipline that does not involve a physical wrong or threat thereof or interference with job rights was the occasion of more extended comment. That legislative debate, however, which is reviewed in depth in the Court's opinion in *Allis-Chalmers*, 388 U.S. at 184-190, casts no light on the issue posed here. As noted above, *Allis-Chalmers* holds, and *Boeing* reaffirms, that whatever doubts there may be about the extent to which Congress provided the Board room to invalidate *other* union disciplinary rules, the legislative history shows that rules against strikebreaking enforced against union members through union proceedings and state court actions to collect any resulting fine do *not* constitute unlawful restraint or coercion under § 8(b)(1)(A). Thus, it is entirely lawful for a union to try and fine individuals who *are in fact* union members for violating the union's ban on strikebreaking. And, there is nothing in the debate on the meaning of restraint and coercion under § 8(b)(1)(A) addressed to who is to be deemed to be a union member.

4. The House of Representatives' approach to regulating the relationship between unions and their members was at the furthest remove from the Senate's approach. H.R. 3020, 80th Cong., 1st Sess., the bill reported by the House Committee on Education and Labor, and passed by the House without any change relevant here, did all of the following.

First, § 7 of the House Bill provided:

> SEC. 7. (a) *Employees shall have the right* to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities (not constituting unfair labor practices under section 8(b), unlawful concerted activities under section 12, or violations of collective-bargaining agreements) for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities: *Provided*, That nothing herein shall preclude any employer from making and carrying out an agreement with a labor organization as authorized in Section 8(d)(4).
>
> "(b) *Members of any labor organization shall have the right* to be free from unreasonable or discriminatory financial demands of such organization, to freely express their views either within or without the organization on any subject matter without being subjected to disciplinary action by the organization, and *to have the affairs of the organization conducted in a manner that is fair to its members* and in conformity with the free will of a majority of the members. [Leg. Hist., 49-50, 176; emphasis added.] [7]

[7] Section 12 of the House bill, referred to in § 7(a), made all of the following "unlawful concerted activities": "force, violence, physical obstruction or threats thereof in labor disputes * * * picketing in numbers or in ways other than those reasonably necessary to give notice of the existence of a labor dispute at the place being picketed * * * picketing a place of business at which no labor dispute exists * * * sympathy strikes, jurisdictional strikes, monopolistic strikes, illegal boycotts, sitdown strikes, and featherbedding * * * strikes and other concerted activities in lieu of using peaceful procedures for settling disputes that the National Labor Relations Act provides * * *." H. Rep. No. 245, 80th Cong., 1st Sess., 44; Leg. Hist. 335.

The House Committee Report explained the Committee's addition at the end of § 7 of the NLRA, as enacted in 1935, of the phrase "and shall also have the right to refrain from any or all such activities" as follows:

> A committee amendment assures that when the law states that employees are to have rights guaranteed in section 7, *the Board will be prevented from compelling employees to exercise such rights against their will*, as it has consistently done in the past. In other words, when Congress grants to employees the right to engage in specified activities, it also means to grant them the right to refrain from engaging therein if they do not wish to do so. [H. Rep. No. 245, 27; Leg. Hist. 318; emphasis added.]

And the Committee Report stated the purpose of the entirely new § 7(b) in these words:

> *Section 7(b).*—The bill adds a new paragraph (b) to section 7. This is designed to protect members of those unions that, instead of following fair and democratic processes in managing their affairs, treat their members as pawns and exploit them for the enrichment or aggrandizement of self-perpetuating leaders. The committee included this clause in response not only to the demands of simple justice, but in response also to pleas of many sincere union people who regard more democracy in unions as one of the greatest needs of unionism. *When, under the Labor Act, we confer upon unions the power they have as exclusive bargaining agents*, entiled by law to handle all the dealings of employees with their employers, clearly *it is incumbent upon us, by the same law, to assure to the employees whom we subject to union control some voice in the union's affairs. This we do by the general provisions of section 7(b), which are implemented by the provisions of section*

8(c). [H. Rep. No. 245, 28; Leg. Hist. 319; emphasis added.]

Section 8(b) of the House Bill, in turn, created three unfair labor practices, the first of which stated:

> (b) It shall be an unfair labor practice for an employee, or for a representative or any officer of a representative, or for any individual acting for or under the direction of a representative, or for or under the direction of any officer thereof—
>
> > (1) by intimidating practices, to interfere with the exercise of employees of rights guaranteed in section 7(a) or to compel or seek to compel any individual to become or remain a member of any labor organization; * * *. [Leg. Hist. 51-52, 178-179.] *

Section 8(c) of the House bill went on to create ten additional unfair labor practices regulating all major facets of the relationship between unions and their members; the first and fourth of these read as follows:

> (c) It shall be an unfair labor practice for a labor organization or any officer thereof, or for any individual acting for or under the direction of a labor organization or for or under the direction of any officer thereof—
>
> > (1) to interfere with, restrain, or coerce individuals in the exercise of rights guaranteed in *section 7(b)*;
> >
> > * * * *
> >
> > (4) *to deny to any member the right to resign from the organization at any time*; * * *. [Leg. Hist. 52-53, 179-180; emphasis added.] *

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* Sections 8(b)(2) & 8(b)(3) of the House Bill imposed a duty to bargain on unions acting as exclusive bargaining representatives and forbade strikes and other concerted activities over matters that are not "a proper subject matter for bargaining." Leg. Hist. 51-52, 178-179.

* Section 8(c)(2) of the House Bill regulated union initiation fees and union dues; § 8(c)(3) thereof prohibited required participation in union insurance and benefit plans, § 8(c)(5) & (6) regulated numerous aspects of how and for what actions union members may be tried for violating union rules; § 8(c)(7) concerned the subject of union security; § 8(c)(8) required that various union matters be decided by secret ballot; § 8(c)(9) prohibited union spying on members and union intimidation of a member's family; and § 8(c)(10) provided for financial reporting. Leg. Hist. 52-56; 179-183.

With regard to § 8(b)(1) the House Committee Report stated:

> *Section 8(b)(1)*.—This is new, making it an unfair labor practice for labor organizations, their officers, agents and representatives, or for employees, to interfere with, restrain or coerce employees. *There is included in this provision a qualification* which is not found in the corresponding paragraph covering employers—*namely, that the interference proscribed is interference by intimidation.* Although it is not intended to permit representatives and their partisans and adherents to harass or abuse employees into joining labor organizations or designating them as their bargaining representatives, it is the purpose of the committee to make entirely certain that Congress does not forbid representatives, by reasonable means, to persuade employees to join the unions. [H. Rep. No. 245, 30; Leg. Hist. 321; emphasis added.]

And, § 8(c)(1) & (4) were described as follows:

> *Section 8(c)(1)*.—Using the device of Section 8(a)(1), the bill makes it an unfair labor practice for unions to interfere with, restrain, or coerce members in the exercise of the general rights guaranteed by section 7(b).
>
> *Section 8(c)(4).—The right to resign from any organization is a fundamental right. This section preserves that right for union members.* (If, when a member resigns, there is in effect as to him an agreement permitted under sec. 8(d)(4), his resigning may result in his losing his job, unless his resignation results from an unfair labor practice by the union under sec. 8(b)(1) or under sec. 8(c).) [H. Rep. No. 245, 31-32; Leg. Hist. 322-323; emphasis added.]

Before turning to a consideration of how the very different Senate Bill and House Bill were transformed in conference into the LMRA, it is, we believe, worth underlining two points about the House Bill.

First, the grant to each employee covered by the NLRA § 7(a) of the House Bill of a "right to refrain from any or all of [the concerted] activities" enumerated in that section does not, on its face, appear to be a grant of a right to join a union whose constitution and bylaws specify limits on resignation and then to resign at any time and in any manner without regard to the organization's rules. While a right to "refrain" most assuredly connotes a right not to join the organization at all, that word is not normally used to signify a right to abandon an agreed-on undertaking at will and without regard to the nature of the agreement. And there is not even a suggestion that the sponsors of the "right to refrain" amendment intended any such arcane meaning. The point of that phrase was *not* said to be to add to the rights of employees who become union members vis-a-vis their union but only to "assure that • • • the *Board* will be prevented from compelling employees to exercise such rights against their will • • •." H. Rep. No. 245, 27; Leg. Hist. 318. Thus, according to its sponsors, this amendment to § 7 of the original NLRA was intended to be a limit on what the *Board* could compel employees to do, not a warrant for the Board to invalidate union rules that, in the Board's view, work an unacceptable compulsion on employees.

Second, the division of § 7 of the House Bill into a subsection (a) granting rights to "employees" generally and a subsection (b) granting rights concerning the "affairs of the organization" to "members of any labor organization" is further evidence that the sponsors of the House Bill did *not* intend by § 7(a) to create a body of membership rights for union members or to otherwise regulate the union-member relationship once that relationship is established. And what the language, structure

and explanations of §§ 7(a) and 7(b) of the House Bill evidence, the language, structure and explanations of §§ 8(b) & 8(c) confirm.

Section 8(c) thereof, which relates back to § 7(b), expressly established what can only be called a regulatory code governing the relationship between unions and their members. As we have seen, § 8(c)(1) made it an unfair labor practice for unions to "interfere with, restrain, or coerce employees in the exercise of *rights granted by § 7(b),*" rights, *inter alia*, "to have the affairs of the organization conducted in a manner that is fair to its members." Further, § 8(c)(4), in terms, made it an unfair labor practice for a union "*to deny to any member the right to resign from the organization at any time.*" There is not a hint that §§ 7(b), 8(c)(1) & 8(c)(4) of the House Bill were, "belt and suspenders" style, a mere reiteration of what had already been stated in §§ 7(a) & 8(b) of the House Bill. Indeed, of the three House Bill § 8(b) unfair labor practices, only § 8(b)(1)'s prohibition of "intimidating practices" that "interfere with rights guaranteed in section 7(a) or [that] compel • • • any individual to • • • remain a member" is even arguably addressed to the same subject matter as §§ 7(b), 8(c)(1) & 8(c)(4). But the House Report emphasizes that, as the language of the prohibition states, § 8(b)(1)'s proscription is directed against "interference by intimidation" in the sense of "harrass[ment] or abuse." H. Rep. No. 245, 30; Leg. Hist. 321. It stretches language past the breaking point to say that a provision in a union constitution limiting resignation from membership is intimidation, harassment or abuse.

5. Insofar as their actions are relevant here, the LMRA Conferees added to § 7 of the original NLRA the phrase from the House Bill "and shall also have the right to refrain from any or all such activities" and added to the Act the Senate Bill's § 8(b)(1)(A) including its proviso; the Conference Bill did not include any of the other House amendments to § 7 outlined above, the

House Bill's § 8(b)(1) or any part of the House Bill's § 8(c).

Senator Taft, the Chairman of the Senate Conferees, introduced the Conference Bill to his colleagues by stating:

> The Senate and House bills followed in some ways the same general division of the matters which were considered in the Senate. However, they were basically so different in many respects that I suppose there may have been a hundred possible differences to be considered, and they were considered for nearly 2 weeks with the House conferees. I think that as a general proposition I can say that the Senate conferees did not yield on any matter which was the subject of controversy in the Senate; certainly not on any important matter. The bill represents substantially the Senate bill. Concessions as to language were made here and there. [Leg. Hist. 1526; *see also id.* at 882 (Rep. Hartley).]

With regard to §§ 7 & 8(b)(1)(A), Senator Taft's "summary in detail of the principal differences between the conference agreement and the bill which the Senate passed" advised:

> *The second change made by the House bill in section 7 of the act (which is carried into the conference agreement) also has an important bearing on the kinds of concerted activities which are protected by section 7.* That provision, as heretofore stated, provides that employees are also to have the right to refrain from concerted activities and collective bargaining if they choose to do so. *Taken in conjunction with the provisions of section 8(b)(1) of the conference agreement* wherein it is made an unfair labor practice for a labor organization or its agents to restrain or coerce employees in the exercise of rights guaranteed in section 7, *many forms and varieties of concerted activities which the Board, particularly in the early days, regarded as protected by the act, will no longer be treated as having that protection.*
>
> • • • •

> Section 8(b) contains the provisions of the conferees' agreement with respect to unfair labor practices by labor organizations or their agents. *Paragraphs 1(a) and 1(b) relating to acts of restraint or coercion by labor organizations are identical with the paragraph dealing with the subject in the Senate amendment.* [Leg. Hist. 1539; emphasis added.] [10]

The otherwise voluminous statement of the managers on the part of the House attached to the House Conference Report shows a well-advised reticence on the provisions at issue here.

The addition of the "right to refrain" to § 7 and its relation to § 8(b)(1)(A) is explained in the same words used by Senator Taft in his detailed analysis except that

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[10] After the vote on the conference report, Senator Taft, in a supplement to that analysis added:

> Section 7. In this section guaranteeing the right of employees to self-organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, there has been inserted the language "and shall also have the right to refrain from any and all of such activities • • •." It is contended that the inclusion of the new language destroys collective bargaining and legalizes the device of the yellow-dog contract. There is similar language in the Norris-LaGuardia Act, a statute outlawing the yellow-dog contract. Moreover, the Board itself has held that a right to refrain from the exercise of the rights guaranteed in section 7 was always implicit in the Wagner Act. (See *Pittsburgh Plate Glass Co.*, 66 NLRB 1083.) The new language therefore, merely makes mandatory an interpretation which the Board itself had already arrived at administratively. The reason for its inclusion was that similar language had appeared in the House bill and since section 8(b)(1) of the Senate bill, which was retained by the conferees, made it an unfair labor practice for labor organizations to restrain or coerce employees in the rights guaranteed them in section 7, the House conferees insisted that there be express language in section 7 which would make the prohibition contained in section 8(b)(1) apply to coercive acts of unions against employees who did not wish to join or did not care to participate in a strike or a picket line. [Leg. Hist. 1623.]

the last sentence of the House Manager's explanation includes the following concluding phrase: "since obviously persons who engage in or support unfair labor practices will not enjoy immunity under the act." H. Conf. Rep. No. 510, 80th Cong., 1st Sess., 39-40; Leg. Hist. 543-544. And the House Managers described § 8(b)(1) as follows:

> Under the new section 8(b) of the Senate amendment, the following unfair labor practices on the part of labor organizations and their agents were defined:
>
> > (1) To restrain or coerce employees in the exercise of rights guaranteed in section 7, or to restrain or coerce an employer in the selection of his representatives for collective bargaining or the adjustment of grievances. *This provision of the Senate amendment in its general terms covered all of the activities which were proscribed in section 12(a)(1) of the House bill as unlawful concerted activities and some of the activities which were proscribed in the other paragraphs of section 12(a).* While these restraining and coercive activities did not have the same treatment under the Senate amendment as under the corresponding provisions of the House bill, *participation in them, as explained in the discussion of section 7, is not a protected activity under the act.* Under the House bill, these activities could be enjoined upon suit by a private employer, specific provision was made for suits for damages on the part of any person injured thereby, and employees participating therein were subject to deprivation of their rights under the act. The conference agreement, while adopting section 8(b)(1) of the Senate amendment, does not by specific terms contain any of these sanctions, but an employee who is discharged for participating in them will not, as explained in the discussion of section 7, be entitled to reinstatement. [H. Conf. Rep. No. 510, 42-43; Leg. Hist. 546-547.] [11]

It bears emphasis that each of the foregoing explanations of the effect of adding a "right to refrain" to § 7 and the § 8(b)(1)(A) union unfair labor practice to the Act, like the House Report's explanation of the addition of that right to § 7(a) of the House Bill (*see* p. 25 *supra*), claims only that the purpose is to narrow the Board's authority to bring coercive or otherwise unlawful activity within the protections of the Act; there is not even a suggestion of a purpose to regulate the relationship between unions and their members.

Finally, while the House Managers' statement never mentions § 7(b) of the House Bill and the determination not to include that provision in the Conference Bill, the fate of § 8(c) of the House Bill is acknowledged:

> *Section 8(c) of the House bill contained detailed provisions dealing with the relations of labor organizations with their members. One of the more important provisions of this section*—that limiting the initiation fees which a labor organization may impose where a permitted union shop or maintenance of membership agreement is in effect—*is included in the conference agreement (sec. 8(b)(5))*

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[11] In explaining the decision not to include § 12 of the House Bill in the Conference Bill, the House Managers returned to the same theme:

> Many of the matters covered in section 12 of the House bill are also covered in the conference agreement in different form, as has been pointed out above in the discussion of section 7 and section 8(b)(1) of the conference agreement. Under existing principles of law developed by the courts and recently applied by the Board, employees who engage in violence, mass picketing, unfair labor practices, contract violations, or other improper conduct, or who force the employer to violate the law, do not have any immunity under the act and are subject to discharge without right of reinstatement. The right of the employer to discharge an employee for any such reason is protected in specific terms in section 10(c). [H. Conf. Rep. No. 510, 59; Leg. Hist. 583.]

and has already been discussed. *The other parts of this subsection are omitted from the conference agreement as unfair labor practices,* but section 9(f)(6) of the conference agreement requires labor organizations to make periodic reports with respect to many of these matters as a condition of certification and other benefits under the act. [H. Conf. Rep. 510, 46; Leg. Hist. 550; emphasis added.]

In sum, there is not a word in the explanations of the Conference Bill claiming any of the following:

• That the addition of the "right to refrain" to § 7, taken separately and/or in conjunction with the inclusion of § 8(b)(1)(A) and its proviso in the Act, is intended to grant the Board the authority—expressly granted in §§ 7(b), 8(c)(1) & 8(c)(4) of the House Bill none of which were included in the Conference Bill—to make union rules restricting resignation from membership an unfair labor practice.

• That the addition of the "right to refrain" to § 7 in conjunction with the prohibition of § 8(b)(1)(A) is intended to limit or to override the § 8(b)(1)(A) proviso's protection of union rules "with respect to the • • • retention of membership".

• That the addition of the "right to refrain" to § 7 is intended to grant union members a right to resign at will in contravention of the union's rules limiting resignation.

6. Given the foregoing legislative history, the governing precedent is *Labor Board v. Drivers Local Union,* 362 U.S. 274, where this Court rejected an earlier Board attempt to read into § 8(b)(1)(A) a union unfair labor practice stated in the House Bill that the 1947 Congress did not choose to enact into law:

> Plainly • • • the [union's] conduct in the instant case would have been prohibited if the House bill had become law.
>
> But the House conferees abandoned the House bill in conference and accepted the Senate proposal. • • •

> This history makes pertinent what the Court said in *Local 1976, United Brotherhood of Carpenters v. Labor Board,* 357 U.S. 93, 99-100: "It is relevant to recall that the Taft-Hartley Act was, to a marked degree, the result of conflict and compromise between strong contending forces and deeply held views on the role of organized labor in the free economic life of the Nation • • •. This is relevant in that it counsels wariness in finding by construction a broad policy . . . as such when, from the words of the statute itself, it is clear that those interested in just such a condemnation were unable to secure its embodiment in enacted law." [362 U.S. at 289-290.]

And the express protection for union membership rules stated in § 8(b)(1)(A)'s proviso together with the legislative history we have outlined unequivocally demonstrates that the Board's major premise for its conclusion that § 8(b)(1)(A) is a grant of authority to invalidate all union restrictions on resignation from membership is wrong. The essence of the Board's rationale as most recently restated is:

> [R]estrictions on resignations impair the fundamental policies found in the express language and consistent interpretation of Section 7. That section expressly grants employees "the right to refrain from any or all" protected concerted activities. *This statutory right encompasses* not only the right to refrain from strikes, but also *the right to resign union membership.* [*Neufeld Porsche-Audi,* 270 NLRB No. 209, Sl. Op. 10; emphasis added.]

The short but complete answer is that neither § 7, nor any other provision of the NLRA as amended by the LMRA, "encompass[] • • • "the right to resign union membership." The 1947 Congress rejected §§ 7(b), 8(c)(1) & 8(c)(4) of the House Bill which did encompass that right and chose instead to enact the proviso to § 8(b)(1)(A) so as "*not* [*to*] *impair* the right of a labor

organization to prescribe its own rules with respect to the acquisition or retention of membership." [12]

7. In *Textile Workers*, and again in *Machinists*, the Court held that "Where a member lawfully resigns from a union and thereafter engages in conduct which the union rule proscribes, the union commits an unfair labor practice when it seeks enforcement of fines for that conduct." See *Machinists*, 412 U.S. at 87, *quoting Textile Workers*, 409 at 217. In those cases, the Court looked to the "law which normally is reflected in our free institutions" and that defines the "right of the individual • • • to resign from associations" to determine whether a union member has "lawfully resign[ed] from membership where the union's "constitution and bylaws are silent on the subject of voluntary resignation." *Machinists*, 412 U.S. at 88.

As the Court stated in *Machinists*, under that body of law, in that circumstance, "members [are] free to resign at will." 412 U.S. at 87-88. *See also* 7 C.J.S., Associations, § 24 ("[I]n the absence of any statute or rule of the association to the contrary, a member may resign or withdraw from the society at his pleasure"); *Communication Workers v. NLRB*, 215 F.2d 835, 838 (2d Cir. 1954) ("Concededly the Union Constitution and bylaws are absolutely silent as to whether a member can voluntarily resign. Hence we think that the common law doctrine on withdrawal from voluntary association is apposite. Under that doctrine, a member of a voluntary association is free to resign at will, subject of course to any financial obligations due and owing the association."); *Braddom v. Three Point Coal Corp.*, 288 Ky. 734, 157 S.W.2d 349, 352 (1941) (adopting C.J.S. statement and noting that the union's bylaws and charter did not prescribe either the duration of membership or the method of termination); *Wall v. Bureau of Lathing & Plaster*, 117 So.2d 767, 771 (Fla. 1960) ("[W]here there is no provision for resignation, the general right of a member of a voluntary association to withdraw therefrom at any time, and have his resignation effective immediately, must prevail.").

[12] The *Neufeld Porsche-Audi* Board's discussion of the "fundamental policies" of the Act rests on the supposition that *Scofield v. NLRB*, 394 U.S. 423 states the "appropriate test to evaluate the lawfulness" of union resignation rules. 270 NLRB No. 209, Sl. Op. 9. *Scofield* states that to be valid under § 8(b)(1)(A) *union rules that address the substance of what union members may do without being subject to union discipline*, must *inter alia*, "impair[] no policy Congress has embodied in the labor laws." 394 U.S. at 430. It is our view that the *Scofield* test does not apply to a rule that does no more than state how and at what times an individual may become a member or how and at what times an individual may resign membership. We do not develop this point more fully because as shown in the text, union resignation rules do not in any event impair any policy that Congress has embodied in the labor laws.

Since, as we have shown, the § 8(b)(1)(A) proviso preserves intact "the right of a labor organization to prescribe its own rules with respect to the • • • retention of membership," the inquiry in this case reduces to that undertaken in *Textile Workers* and *Machinists*: whether under the common law of associations the resignations here were lawful. And, under that body of law, where there is a "contractual restriction on a member's right to resign" (*Machinists*, 412 U.S. at 88), the rule is as follows:

> An affiliation with an association ordinarily is viewed as constituting an implied agreement to be bound by its constitution and bylaws. • • • A member, by becoming such, subjects himself, within legal limits, to the power of the association to make and administer its own rules, and accordingly, is subject to the regulations governing membership and the rights of the members, as set forth in its charter, constitution and bylaws. • • • *Where the rules of an association provide for the withdrawal of members, there can be no withdrawal except in the manner and on the conditions prescribed.* [7 C.J.S. Associations, §§ 6, 19, 22; emphasis added; footnotes omitted.]

See also 6 Am. Jur. 2d Associations and Clubs, § 26; *Colonial Country Club v. Richmond*, 140 So. 86 (La. 1932) (when resignation must be delivered to secretary of club by January 1 to be effective, delivery to the club's "golf professional" insufficient); *Boston Club v. Potter*, 212 Mass. 22, 98 N.E. 614, 615 (1912) (resignation not permitted while back dues continue to be owing); *Ewald v. Medical Society*, 70 Misc. 615, 128 N.Y.S. 886, 888, 891 (N.Y.App. 1911) (upholding enforcement of provision in county medical society's bylaws that "[n]o resignation shall be accepted from a member [who is] • • •under [ethical] charges," in part because "any discreditable act of a member in his professional relations tends to discredit the [entire medical] society"); *Associated Press v. Emmett*, 45 F. Supp. 907, 919, 921, 923 (S.D. Cal. 1924) (upholding enforcement of provision in wire service's bylaws stating that members of wire service may resign from membership only upon two years' notice or consent of the Board of Directors, whichever comes sooner.) *Compare Haynes v. Annandale Golf Club*, 4 Cal. 2d 28, 47 P.2d 470 (1938) (bylaws providing without more that resignations must be "accepted" to be effective are unenforceable).

The earliest American case in point we have found is *Troy Iron and Nail Factory v. Corning*, 45 Barb. 231 (N.Y. 1864). In *Troy Iron*, an association of landowners, formed to improve the quality and flow of a stream running through its members' property, sued a member who had attempted to resign and had refused to pay his dues because he had concluded that his membership benefits were not commensurate with his dues payments. The Court entered judgment for the association, approving the association's rule that no member may resign so long as he continues to own or occupy land that would be benefitted by improvements in the flow of the stream:

> It would be impossible, as a condition of withdrawal, to deprive them entirely of the use of the water

> power which had been largely increased and furnished them by the improvement made by the association, and utterly impracticable to restore the parties to the same equitable footing which they relatively occupied before the improvements were made by the association. [45 Barb., at 255-256.]

A more recent decision to the same effect is *Leon v. Chrysler Motors Corp.*, 350 F. Supp. 877 (D.N.J. 1973), *aff'd mem.*, 474 F.2d 1340 (3rd Cir. 1974), which held that automobile dealers who join other dealers in a mutual advertising association are bound by a clause in their membership agreement providing that no dealer may withdraw from membership except with the consent of a majority of the association's members:

> [T]he promise of each [dealer] to join was an incentive for all to assent to mutual cooperation. Indeed, it was a powerful incentive, as any nonassociating dealer would reap the harvest of the Association's labor without shouldering his fair share of the costs. The same would be equally true of those who joined but later seceded. To prevent a potential floodtide of withdrawals, the Associations adopted [the majority approval requirement]. • • • That obligation may not now be dishonored simply because plaintiffs have become convinced they made a poor bargain. [350 F. Supp. at 886, 888.] [13]

These cases, and others like them, establish that an association may place restrictions on its members' right to resign where such restrictions are designed to further

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[13] See also *Kingston Dodge Inc. v. Chrysler Corp.*, 449 F. Supp. 52 (M.D. Pa. 1978), another mutual advertising case, where the court similarly held an automobile dealer bound by his agreement not to resign from the association unless the majority consented to such withdrawal. ("[T]o permit a member to withdraw against his solemn promise, which incidentally was the bargained for consideration, would not only harm the remaining members but would enable the withdrawing member to still reap the benefits of the association's mass advertising." 449 F. Supp. at 55.)

a basic purpose for which the association was formed. The Union's resignation rule is, of course, precisely that type of restriction. See *Allis-Chalmers*, 388 U.S. at 181-182.[14] The Pattern Makers promulgated that rule to protect the common interest of maintaining a united front during the most critical time a union faces—an economic strike. Each member joined the Unions, or retained his membership when free to resign, with the understanding that he was agreeing not to resign during a strike or when a strike appeared imminent, and with the further understanding that other members were agreeing to be similarly bound.

In the context of this strong interest in group solidarity, the result under the established common law principles is clear: While no employee in the bargaining unit is required to join the union in the first place, once he joins and begins receiving the benefits of union membership, the fundamental law of associations dictates that he may be bound by a union resignation rule of the kind at issue here, to which he agreed and from which all members mutually benefit, requiring him to continue his membership when the union is in greatest need of solidarity.

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[14] The Court said there:

> National Labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions.
>
> * * * *
>
> Integral to the federal labor policy has been the power in the chosen union to protect against erosion [of] its status under that policy through reasonable discipline of members who violate rules and regulations governing membership. *That power is particularly vital when the members engage in strikes. The economic strike against the employer is the ultimate weapon in labor's arsenal for achieving agreement upon its terms, and "[t]he power to fine or expel strikebreakers is essential if the union is to be an effective bargaining agent . . . ."* [388 U.S. at 180-181; emphasis added.]

CONCLUSION

For the above-stated reasons, the judgment below should be reversed.

Respectfully submitted,

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No. 83-1894

IN THE

Supreme Court of the United States

October Term, 1984

PATTERN MAKERS' LEAGUE OF NORTH AMERICA, AFL-CIO, and ITS ROCKFORD AND BELOIT ASSOCIATIONS,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD
and
ROCKFORD-BELOIT PATTERN JOBBERS ASSOCIATION,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF TEAMSTERS FOR A DEMOCRATIC UNION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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November 1984

QUESTION PRESENTED

Does section 7 of the National Labor Relations Act permit employees to make an enforceable agreement not to break a strike which they have begun pursuant to a democratic vote, before it has been ended by democratic procedures?

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BRIEF OF TEAMSTERS FOR A DEMOCRATIC UNION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*

Teamsters for a Democratic Union ("TDU") is a voluntary unincorporated association comprised of 10,000 individuals, all of whom are members of the International Brotherhood of Teamsters. TDU's goal is to reform and democratize their union and, in so doing, to make it more responsive to the needs of its members. TDU members believe that a responsive union would be a more effective collective bargaining representative and would thus better serve their ultimate objectives of better working conditions.

TDU members have been actively involved in political affairs and in disputes within their union about the manner in which the union's bargaining power should be used. They have run for union local and international office, offered their views on proposed collective bargaining agreements, and sought legislation to better protect Teamster working conditions. TDU and its members have also played an active role as parties and *amicus curiae* in litigation designed to enforce federal statutes which protect union dissenters by guaranteeing them freedom to speak and to sue, *e.g., Helton v. NLRB,* 656 F.2d 883 (D.C. Cir. 1981); *Pawlak v. Greenawalt,* 628 F.2d 826 (3d Cir. 1980), fair elections, *e.g., Teamsters Local 82 v. Crowley,* 52 U.S.L.W. 4757 (1984), fair contract votes, *e.g., Bauman v. Presser,* 117 LRRM 2393 (D.D.C. 1984), and fair representation. *E.g., DelCostello v. Teamsters,* 51 U.S.L.W. 4693 (1983); *Hines v. Anchor Motor Freight,* 424 U.S. 554 (1976); *Early v. Eastern Transfer,* 699 F.2d 552 (1st Cir. 1982), *cert. denied,* 52 U.S.L.W. 3263 (1983).[1]

TDU also believes, however, that the concomitant of the right to participate in democratic decisionmaking about how a union should employ its collective bargaining power is the duty to accept the majority's decision and to stand by the decision until the majority votes to change it. Once a decision has been made by democratic means, it must be respected by the electorate which in turn produces a united front vis-a-vis the employer.

The Board's rule that a union cannot insist that members stand by their commitments is clothed in the language of individual rights. In fact, however, it demeans the individual right to engage in collective activity by undermining the effectiveness of that activity, and devalues the right to participate in the union's decisionmaking process by making union democracy a futile exercise. TDU submits this brief to be sure that the interest of individual union members in overturning the Board's rule is heard along with the unions' institutional interests, which are expressed in Petitioners' brief.

[1]Some of these cases involved PROD, which merged with TDU in 1979.

STATEMENT

This case arose in the aftermath of an unsuccessful strike conducted by two locals of the petitioner Pattern Makers' League against a multi-employer bargaining unit in Rockford, Illinois and Beloit, Wisconsin. After taking a strike vote by secret ballot as required by the union constitution, League Law 49(1), 43 members of the two locals commenced a strike for a new collective bargaining agreement on May 5, 1977. Pet. App. 30a. During the strike, all members accepted strike benefits from petitioners in amounts between $125 and $150 per week. *Id.* Nevertheless, on September 11, 1977, one of the union's striking members tendered his resignation and returned to work. Two weeks later, four more employees tendered resignations and returned to work; by December 2, the number of members who had purported to resign in order to cross the picket line had reached eleven, Pet. App. 27a-28a, all but one of whom was a member of the Beloit local. Pet. App. 11a. This breach of solidarity by such a large minority of the workforce prolonged the strike and compelled the locals to accept a contract embodying what they and their members believed to be inadequate wages and benefits. Pet. App. 31a.

One of the provisions in the union constitution, League Law 13, bars resignations during a strike or lockout, or

when a strike or lockout appears imminent, Pet. App. 28a; another provision prohibits members from working in a struck shop. League Law 49(3). Accordingly, after the strike ended petitioners notified the strikebreakers that their resignations had not been accepted, and assessed fines in an amount equivalent to the money that they had earned from the employers by crossing the picket line. Pet. App. 28a.

The National Labor Relations Board, agreeing with the recommendation of its Administrative Law Judge, ruled in a divided decision that the union could not enforce League Law 13 to prevent the resignations. And, because the strikebreakers were no longer members, the union could not impose fines on them. Pet. App. 13a. The Court of Appeals for the Seventh Circuit enforced the Board's order, ruling that the Act gives employees the right to avoid their collective commitments by simply changing their minds at any time. Pet. App. 8a.

SUMMARY OF ARGUMENT

The Board and the court below treated the issue in this case as a conflict between the section 7 rights of employees who seek to refrain from further participation in a strike, and the institutional interests of a labor organization which seeks to harness them to a failing collective enterprise. TDU believes that this analytic framework is fundamentally misconceived. To the contrary, this case presents the question whether employees' section 7 right to join together for mutual aid and protection allows them to make an agreement which binds all members so that the cohesiveness of the group is not destroyed.

The two quintessential rights under section 7 are the right to join a union and the right to strike. Without these

rights, employees cannot participate effectively in the system of collective bargaining which the NLRA is designed to foster. Yet during the economic conflict between employees and employers, there is great pressure on each individual employee to abandon the concerted activity which he has undertaken and return to work. Unless each employee knows, before the strike begins, that the strikers will be able to maintain their cohesion against these individualized pressures, no employee will have an incentive to initiate the collective activity. And unless the employer knows that the group can hold together, it will have no incentive to bargain with the union as an equal economic force.

Seen in this light, a union rule which limits its members' desire to return to work, even if the member "resigns" in order to do so, is not a limitation on section 7 rights but rather the product of the exercise of the section 7 right to band together with other employees for the purpose of collective bargaining. And by invalidating such union rules, the Board is cramping the effectiveness of what Congress intended and this Court has recognized as the only weapon in labor's arsenal for collective bargaining with employers. Even more important, it denies to each employee the section 7 right to voluntarily enter into a enforceable collective commitment to stand together for the duration of the strike.

ARGUMENT

The National Labor Relations Board and the Court of Appeals characterized this case as a conflict between the section 7 rights of dissenting employees who face economic hardships during a strike and the institutional interests of unions which seek to win the strike. The unions, for their part, argue for their right to be free from undue

government control of their regulation of the conduct of their members. Although recognizing the force of the unions' arguments based on the legislative history of the NLRA, TDU believes that both parties miss the mark by assuming that section 7 rights and institutional interests are necessarily in collision. In TDU's view, the Board's decision does not protect the section 7 rights of the dissenting employees; rather, it restricts the section 7 rights not only of the majority but even of the dissenters themselves. To understand why that is so, and why the Act forbids enforcement of the Board's order, it is necessary to examine the role of section 7 rights, and their exercise in the form of a strike as part of the system of labor relations which Congress has sought to foster by passing the National Labor Relations Act.

The NLRA is founded on the Congressional recognition that, in most instances, the individual employee lacks sufficient bargaining power to achieve a fair agreement with his or her employer over the terms and conditions of employment. Rather than supplant the free market entirely by creating a system of detailed government regulation of the terms and conditions of employment, Congress chose to give employees the opportunity to join together for the purpose of free bargaining with their employers.

Indeed, recognizing that the inevitable result of individual bargaining under conditions of inequality was to foster feelings of unfairness and inevitable conflicts which would disrupt interstate commerce and thus harm the public interest, Congress chose not simply to provide the opportunity, but indeed to "encourag[e] the practice and procedure of collective bargaining and . . . protect the exercise by workers of full freedom of association, self-organization and designation of representatives of their own choosing, for the purpose of negotiating the terms

and conditions of their employment . . .." NLRA § 1, 29 U.S.C. § 151. Thus, Congress provided employees with the rights "to self-organization, to form, join or assist labor organizations . . . and to refrain from any or all of such activities . . .," § 7, 29 U.S.C. § 157, "as an instrument of [that] national labor policy." *Barrentine v. Arkansas-Best Freight System,* 450 U.S. 728, 735 (1981).

Congress did not, of course, require employees to participate in the regime of collective bargaining. Instead, employees in any unit appropriate for bargaining were given the power to choose by majority rule, under the strict supervision of an impartial government agency, whether to bargain individually or collectively. § 9, 29 U.S.C. § 159. Once the majority decision is made to exercise the option to bargain collectively, Congress required employers to bargain with the employees through their chosen representatives and to attempt in good faith to reach an accommodation of the interests of both sides in the form of a written collective bargaining agreement.

Section 7 rights are thus intended to enable employees to freely choose whether to engage in collective bargaining. But the role of section 7 does not end once a bargaining representative has been chosen, because it is still needed to ensure that the bargaining itself proceeds effectively. After all, so long as the employer fulfills its obligation to bargain in good faith, it need not agree to any proposal advanced by the union, nor make a concession on any term. *H.K. Porter Co. v. NLRB,* 397 U.S. 99 (1970). Thus, the terms of employment set by the employer remain in effect and govern the employees' working conditions until the employees, acting through their bargaining representative, can persuade the employer to agree to a change. Indeed, once collective bargaining has run its

course and the employer has bargained in good faith until an "impasse" is reached, it has the right to alter working conditions and even lower wages unless the union can persuade it not to do so.

Despite the best efforts of both sides to reach an agreement, it is inevitable that from time to time they may be unable to find a compromise with which each is satisfied. But as long as the employees continue to work, the employer's profits are unaffected, and it therefore lacks an incentive to break the logjam by accepting changes which it believes to be contrary to its economic interest. Thus, it is only by exercising their section 7 right to concertedly withhold their labor from the employer, or by threatening to do so, that employees can hope to pressure a reluctant employer to change its position:

> The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized. Abstract logical analysis might find inconsistency between the command of the statute to negotiate toward an agreement in good faith and the legitimacy of the use of economic weapons, frequently having the most serious effect upon individual workers and productive enterprises, to induce one party to come to the terms desired by the other. But the truth of the matter is that at the present statutory stage of our national labor relations policy, the two factors — the necessity for good faith bargaining between the parties, and the availability of economic pressure devices to each to make the other party incline to agree to one's terms — exist side by side.
>
> *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 489 (1960).

The central role of the strike in effectuating the policy of collective bargaining is therefore apparent: "The economic strike against the employer is the ultimate weapon in labor's arsenal for achieving agreement upon its terms . . .." *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 181 (1967). Because the strike, or the threat of a strike, is the workers' *only* means of pressuring employers, it is the essence of the concerted activities protected by section 7. In fact, Congress considered the right to strike to be so important that section 13 states that nothing in the Act may diminish it in any way, "except as specifically provided herein." 29 U.S.C. § 163.

Like the decision to bargain collectively, the decision to strike must be respected by the minority until democratically revoked.[2] The importance of maintaining employees' solidarity during a strike is obvious. If the strike is to equalize their bargaining power with the employer and thus to serve the employees' objective of inducing the employer to change its position, it must be as effective as possible. This means that the employees must be able to maintain pressure on the employer by denying it access to its experienced labor pool, thus affecting its productivity and profits.

The employer, for its part, is unlikely to take this challenge to its perceived interests lying down; it will seek to operate during the strike, thus leaving the employees without income while it maintains production, and thereby putting pressure on the employees to agree to its

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[2]By the same token, if the employees decide by majority rule to accept the employer's terms, the minority are bound by that decision and cannot conduct a "wildcat" strike in order to press their own views of what settlement would be desirable. *NLRB v. Sands Mfg. Co.*, 306 U.S. 332 (1939). *See also Emporium Capwell Co. v. Western Add'n Community Org.*, 420 U.S. 50 (1975).

demands. When an employer tries to maintain operations during the strike, the NLRA has been held not to preclude it from taking reasonable steps to protect its interests. Thus, for example, it may hire permanent replacements for striking employees, *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938), and may subcontract work for the duration of the strike. *Hawaii Meat Co. v. NLRB*, 321 F.2d 397 (9th Cir. 1973); *Empire Terminal Warehouse Co.*, 151 NLRB 1359 (1965). It may even anticipate a threatened strike by choosing its own time for the initiation of economic warfare, by locking out the employees who have been unwilling to agree to the employer's offered terms. *American Shipbuilding Co. v. NLRB*, 380 U.S. 300 (1965).

The employees' decision to exercise their statutory right to collectively reject the employer's terms and to strike is thus not without risks and is not undertaken lightly. Before employees strike, they will want some assurance that they will be able to finish what they start, which means, in practical terms, that they will have the collective stamina to withstand the severe economic pressures which the employer is lawfully permitted to bring to bear. They must recognize that each of them and their families may be faced with economic hardship, and that it may well become tempting for individual strikers to betray the collective trust by succumbing to the employer's demands and going back to work while their fellow employees continue to strike. If an individual could continue to earn income during the strike, and then reap the benefits of the collective pressure his colleagues on the picket line brought about, he would have the best of both worlds. In addition, he would retain his job if the strikers were permanently replaced and thus lost jobs in which they may have many years of seniority. In this manner, just as it happened during the strike from which this case arose, strikebreaking by

a single member can easily lead to a snowball effect in which an increasing number of individuals flout the majority decision to go on strike. *Supra* at p. 3. *See Machinists Local 1327 v. NLRB*, 725 F.2d 1212, 1217 (9th Cir. 1984).

If the employees knew in advance that individual workers could gain a free ride by going back to work, the likelihood of successful collective action by employees would be significantly diminished, if not eliminated entirely. Thus, each individual must be assured that the collective decision will be honored and that some of their fellow members will not try to walk away from the decision to strike, except as part of a collective decision to compromise with the employer. By adopting the union rules at issue in this case, pursuant to which each striker who returns to work before the majority has voted to do so is fined for that conduct, the unions have adopted the only sensible response to the dilemma of this free rider problem.

This is not the only context in which a free rider problem arises in collective bargaining. The continuing responsibilities of bargaining for contracts, policing the contract, hearing grievances, establishing a system for the adjudication of disagreements between employees and employer about the meaning of the contract, analyzing employer proposals, and the like, require the creation of organizations which can hire a staff, open offices, and support the membership during strikes. All of this takes money, and Congress has recognized the profound unfairness of requiring the employees to bargain collectively for and to represent fairly all members of the bargaining unit, without requiring all the beneficiaries to bear the costs which that entails. Accordingly, every member of the bargaining unit may be required to "support the union," but only to the extent of paying reasonable initiation fees

and union dues, if the employees and employer so agree in collective bargaining. NLRA §§ 8(a)(3) and 8(b)(5), 29 U.S.C. §§ 158(a)(3) and 158(b)(5). But it remains a wholly voluntary decision by each employee whether to take the further step of joining the association of employees (*i.e.*, their union), as the resigning members did here before the strike, and thus to assume the various rights and responsibilities which membership entails. *NLRB v. General Motors Corp.*, 373 U.S. 734, 742 (1963).

Congress has also imposed various responsibilities on employee organizations in order to protect the voluntary character of the decision whether or not to assume full membership. The union has a duty to fairly represent all members of the bargaining unit, not just members of the union. *Vaca v. Sipes*, 386 U.S. 171 (1967); *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953). It cannot bargain for higher wages for members than for nonmembers. *Radio Officers' Union v. NLRB*, 347 U.S. 17, 47 (1954). It cannot refuse to process grievances for nonmembers, *Abilene Sheet Metal Co. v. NLRB*, 619 F.2d 332, 347 (5th Cir. 1980), nor refuse to refer them for work. *Teamsters Local 357 v. NLRB*, 365 U.S. 667 (1961). The union cannot discriminate against nonmembers by seeking their discharge for any reason except nonpayment of dues, and employers for their part are also forbidden to discriminate against nonmembers. *Radio Officers' Union v. NLRB*, 347 U.S. 17, 41-42 (1954). Most important for purposes of this case, the union's rules cannot apply to nonmembers and they cannot be disciplined (*i.e.*, fined) for violating them. *NLRB v. Granite State Jt. Bd.*, 409 U.S. 213, 217 (1975).

By contrast, an employee who does make the voluntary choice to join the employees' collective organization acquires a set of rights and responsibilities which are defined in part by the democratic decision of the employees themselves, and in part by Congress' decision in enacting the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"). Thus, members have the right to choose their officers, who will lead the employees in the collective bargaining process, 29 U.S.C. §§ 481-483, and to attempt to persuade the elected leadership, and each other, of the best course for the collective body to follow. 29 U.S.C. § 411(a)(2). They have the right to participate in the deliberations on union business, 29 U.S.C. § 411(a)(1), and the right to control the level of dues charged both to themselves and to any other employees who have chosen not to become full members of the union. 29 U.S.C. § 411(a)(3). And the law gives them the right to adopt and amend a constitution for the organization, 29 U.S.C. § 431(a), which sets forth the procedures by which union decisions will be made and the procedures by which violations of the collectively adopted rules will be punished. In exercising these LMRDA rights to influence union affairs, they are also exercising their rights under section 7 of the NLRA. *General Motors Corp. v. NLRB*, 512 F.2d 447 (6th Cir. 1975).

The decision to engage in a strike, like the decision to accept an employer's proposals and refrain from striking, is made by the members of the union pursuant to this federally protected democratic procedure. Despite the pressures which the members collectively face as a possible strike draws near, each member retains the right to speak out against the leadership and against the majority to try to persuade them either that greater or lesser militance is required in the particular circumstances. *See NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 191 (1967). If a proposal is put forth by the union leaders, the members

have the right to debate it and to consider the best course of action before they vote, so that their decision will be an informed one. *Bauman v. Presser*, 117 LRRM 2393 (D.D.C. 1984).

It is the union's members who decide whether to take the very real risks of engaging in a strike against their employer, and who may call upon the collective for support in the form of payments from the union's strike fund. It seems only fair that those who have and exercise these rights should also be free to include in their decision to strike the personal commitment to stand together in the face of adversity, and thus to continue the strike together until a majority decision is made to abandon it. Indeed, it demeans the individual decision to join or not to join the employee organization for the Board to say that members of that organization cannot commit themselves to stand together in the hour when they need each other the most.

In rejecting another union's attempt to fine members who resigned their membership and then crossed the picket line, *NLRB v. Granite State Jt. Bd.*, 409 U.S. 213, 217 (1972), the Court gave "little weight" to the fact that the fined strikers had themselves participated in the passage of the resolution providing for fines for members who crossed the line. But the reason for disregarding that fact was that the resolution as passed applied only to members, implicitly leaving open the right to resign from the union and thus avoid its force. And the Act requires that, before a majority decision can be applied to waive the rights of individual employees under section 7, there must be a clear and unambiguous expression of intent to surrender the right. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). Thus, in *Granite State*, the Court properly insisted upon a strict reading of provisions said to work a waiver of the section 7 right to refrain from engaging in

concerted activity. *See also Machinists Booster Lodge 405 v. NLRB*, 412 U.S. 84, 89 (1973). Here, by contrast, the union rules clearly restricted the right to resign during a strike, and therefore were sufficient to waive that right.

The Board justifies its decision by saying that the employee "right" to refrain from concerted activities cannot be outweighed by the mere institutional "interest" of the union. *Machinists Local 1414 (Neufeld Porsche-Audi)*, 170 NLRB No. 209, 116 LRRM 1257, 1261 (1984). This statement is inconsistent with the well-established law that the rights protected by section 7 must be weighed against the *employer's* institutional interests in operating its business.[3]

But even more important, the Board's analytic framework, which treats this case as a conflict between individual rights and institutional interests, is fundamentally unsound. What the Board overlooks is that the formation of a union and the adoption of its constitution and bylaws

[3]Thus the employer is permitted to use the various tactics discussed *supra* at 10, which are intended to discourage the exercise of the right to strike. The employer may forbid union solicitation and literature distribution in a variety of circumstances, *NLRB v. Babcock & Wilcox*, 351 U.S. 105 (1956); *Republic Aviation v. NLRB*, 324 U.S. 793 (1945), and may even seek to discourage self-organization by closing its business. *Textile Workers v. Darlington*, 380 U.S. 263 (1965). Indeed, unlike the institutional interests of employers, which have simply been presumed despite the absence of any statutory language recognizing them, *see* Atleson, *Values and Assumptions in American Labor Law* 1, 19-21 (1983), the right of unions to regulate their internal affairs, particularly the acquisition and retention of union membership, is expressly protected by the proviso to section 8(b)(1)(A). If employers' institutional interests are entitled to consideration and frequently outweigh section 7 rights, it is odd that the Board is unwilling to give the same deference to the institutional intersts of labor organizations.

generally, and in particular the rule against resignation for the purpose of crossing the picket-line during a strike, are themselves the expression of the employees' right to engage in concerted activities under section 7, *i.e.*, the rights of employees "to form, join or assist labor organizations" and "to engage in other concerted activities." By refusing to allow the enforcement of the rule, the Board denies not only the rights of the employee majority, but also the right of the very same dissenting employee who now seeks to return to work without penalty, to enter into a meaningful collective contract with other employees so that the rights guaranteed by section 7 are not empty promises.

In this sense, the section 7 right which the Board would deny is analogous to the freedom of contract; indeed, this Court has frequently noted that the rights and obligations imposed by a union constitution are contractual in nature. *E.g., NLRB v. Boeing Co.*, 412 U.S. 67, 75-76 (1973). It is not at all unusual for an individual who voluntarily enters a contract to decide at a later time that the contract was disadvantageous. But it is scarcely consistent with the freedom of contract to allow such an individual to escape his or her bargain for that reason alone. So long as the contract was freely entered – and it is the purpose of the Congressional scheme discussed above to ensure that no employee is coerced into assuming the obligation and that democratic procedures are followed both in adopting the constitutional rule and in deciding to strike – the freedom of contract, and the analogous section 7 right to join together to engage in collective activity, require the enforcement of that contract and not its abrogation.

To say that the dissenting members are stuck with their bargain, of course, is not to say that they are without any recourse to protect their interests when the decision to

strike appears to them, in retrospect, to have been erroneous. They may argue with their fellow members that enough is enough, and urge them to work together to bring the strike to an end. *Parker v. Steelworkers Local 1466*, 642 F.2d 104 (5th Cir. 1981). They may meet as a dissident caucus to plot a strategy for ending the strike. *Keubler v. Cleveland Lithographers*, 473 F.2d 359, 362-363 (6th Cir. 1973). They may initiate a campaign against the union leadership, or even seek to have the union decertified as their collective bargaining representative. *Machinists Lodge 702 v. Loudermilk*, 444 F.2d 719 (5th Cir. 1971).

And of course, although they are not free to cross the picket line, dissenting employees may seek to work for other employers and simply abandon their jobs with the struck employer. For although the issue is framed in terms of a right to resign, the real issue is whether a union can create an effective mechanism for enforcing its rule against strikebreaking by fining members who purport to resign their membership in order to evade their obligations under that rule. If the employees resign without crossing the picket line, the reason for the discipline disappears. *See* Note, *Union Power to Discipline Members Who Resign*, 86 Harv. L. Rev. 1536, 1549 *et seq.* (1973).

Thus, union members who decide that the strike is no longer a worthwhile endeavor have numerous ways to protect their individual and collective interests. What they may not do is break their contract with their fellow members to join collectively in withholding their labor from the employer by returning to work before the majority decides to do so.

CONCLUSION

For these reasons, as well as those stated in petitioners' brief, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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No. 83-1894

In The

Supreme Court of the United States

October Term, 1984

PATTERN MAKERS' LEAGUE OF NORTH AMERICA, AFL-CIO, AND ITS ROCKFORD AND BELOIT ASSOCIATIONS,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD

and

ROCKFORD-BELOIT PATTERN JOBBERS ASSOCIATION,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR ROCKFORD-BELOIT PATTERN JOBBERS ASSOCIATION—A RESPONDENT

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QUESTION PRESENTED

Are employees unlawfully restrained in the exercise of their statutory right to refrain from concerted activity by a union constitutional provision which denies the employees the freedom to resign from union membership during a strike or when a strike is imminent and thus escape the union rule, enforceable by court collectible fines, which prohibits the return of members to work during a strike?

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SUMMARY OF ARGUMENT

The union argues that the proviso of Section 8(b) (1) (A) of the National Labor Relations Act (NLRA) authorizes the union to invalidate an employee's resignation from membership and therefore prevent his escape from fines

imposed to restrain the employee from crossing a picket line. The union position is not supportable.

1. The NLRA, as amended by the Labor-Management Relations Act, was enacted to protect the right of individual employees in their relations with both unions and employers. This is clearly stated in the Congressional Declaration of Purpose and Policy, 29 USC 141(b), and recognized by the courts. *Mosher Steel Co. vs. NLRB,* 568 F2d 436, 442 (5th Cir. 1978).

2. Congress has firmly imbedded into the NLRA, as a national policy, the right of the individual employee to resign from union membership. Section 7 NLRA, 29 USC 157 clearly states that employees have the right to refrain from any or all union activities. This right is recognized by the courts. Congress made only one exception: by union-management agreement an employee can be required to pay dues and an initiation fee. Section 7, Section 8(a) (3) NLRA. There are no other exceptions. There are no limitations.

The union's reliance on the proviso of Section 8(b) (1) (A) is not well placed. The proviso permits the union to fix standards for admission to the union and fix requirements which must be met (payment of dues, attendance at meetings, etc.) to retain membership. Failure to meet such requirements can result in expulsion. Nowhere does the Act empower a union to force an employee to continue membership by refusing to honor a resignation at any time.

The use of the words "acquisition or retention" in Section 8(b) (1) (A) and the words "acquiring or retaining membership" in Sections 7 and 8(a) (3) demonstrate that Section 8(b) (1) (A) does not authorize the union to

force an employee into involuntary membership subject to the union's discipline.

The accepted meaning of the word "retain" does not support the union's position.

Neither is there any support for the union's position to be found in the Legislative History. Senator Taft explained that "the right to refrain from any or all such activities" was added to Section 7 to make Section 8(b) (1) apply to the coercive act of unions against employees who did not wish to join or did not wish to participate in a strike or picket line. Later Senator Taft explained "all it would do would be to outlaw such restraint and coercion as would prevent people from going to work if they wished to go to work." Congressman Hoffman stated that Section 7(a) of the House Bill meant that employees would have the right to join or not join, to be bound by or not be bound by, union rules.

Although the House Bill in 1947 was more detailed, the House Conferees accepted the Senate Bill because it was "broader in its scope" of outlawing union unfair labor practices. The Conferees' Report explained that while they accepted the broader language in Section 8(b) (1), they insisted upon the explicit language of Section 7 guaranteeing the right to refrain from any and all union activity.

Nowhere in the Legislative History is there support for the union position.

3. The union's common law theory must give way to the provisions of the governing statute.

The union's "solidarity" theory has already been disposed of by this Court.

4. The decision of the Seventh Circuit in this case is consistent with the decisions of this Court. In *Allis-Chalmers*, 388 U.S. 175 (1967), this Court held that a union could discipline a full member and pointed out the distinction between a "full member" and a "financial core" member. In *Scofield*, 397 U.S. 423 (1969), this Court held that a union rule could be enforced only if it "• • • impairs no policy Congress has imbedded in the labor laws and is reasonably enforced against members who are free to leave the union and escape the rule." In *Granite State*, 409 U.S. 213 (1972), this Court stated "[W]hen there is a lawful dissolution of a union-member relation, the union has no more control over the former member than it has over the man in the street". In *Booster Lodge*, 412 U.S. 84 (1973), this Court said: "[W]e are no more disposed to find an implied post-resignation commitment from the strike-breaking proscription in the union's constitution here than we were to find it from the employees' participation in the strike vote and the ratification of penalties in *Granite State*."

The Court left open the question of the extent to which contractual restriction on a member's right to resign may be limited by the Act. *Booster Lodge*, Id.

The Seventh Circuit faced that issue in this case and reasoning from this Court's decisions held that any union rule which denies its members the opportunity to resign during a strike, or when one is imminent, is invalid.

More recently the National Labor Relations Board, after reviewing the above decisions, concluded that any restriction placed by a union on its members' right to resign are unlawful. *Neufeld Porsche-Audi*, 270 NLRB No. 209, June 22, 1984, 116 LRRM 1257.

ARGUMENT

It is well established that a union may impose a court collectible fine upon a full member who violates a valid internal rule of the organization. *NLRB vs. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967); *Scofield vs. NLRB*, 394 U.S. 423 (1969). It is equally well established that a union may not impose a court collectible fine upon an employee who is not a member of the organization including an employee who has resigned from that membership to escape the consequences of the internal union rule. *NLRB vs. Textile Workers Local 1029, Granite State*, 409 U.S. 213 (1972); *Booster Lodge No. 405, I.A.M. vs. NLRB*, 412 U.S. 84 (1973).

The union now argues that the proviso of Section 8 (b) (1) (A) of the National Labor Relations Act (NLRA), 29 USC 158(b) (1) (A) authorizes the union to prohibit the resignation of an employee from membership during, or immediately before, a strike so that the employee is not free to escape the union rule prohibiting the crossing of a picket line but must remain subject to the restraint and coercion of a court enforcable fine for violating the union rule. The union argument would lead to the conclusion that under the proviso of Section 8(b) (1) (A) NLRA, a union may by rule require a member to remain a member for life. Indeed the union appears to so argue at pages 35-38 of the Brief for Petitioners. ("Pet. Br.")

The union's position is not supportable.

1. The protection of the rights of individual employees is an express purpose of Congress.

The NLRA was designed by Congress, in 1935, to protect the individual employee from the then unequal power of employers. In 1947 Congress adopted the Labor-Management Relations Act to amend the NLRA to protect individual employees from the growing excesses of labor unions. Congress clearly expressed its policy in its declaration of purpose and policy of the Labor-Management Relations Act. 29 USC 141(b) second paragraph:

> It is the purpose and policy of this Chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both *employees* and employers in their relations affecting commerce, * * * *to protect the rights of individual employees in their relations with labor organizations* whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, * * *. (Emphasis added)

Nowhere did Congress state a purpose for the benefit of labor unions. This case, therefore, must be judged in the light of the Congressional purpose "to protect the rights of individual employees in their relations with labor organizations". Labor Management Relations Act, 29 USC 141(b).

In *Mosher Steel Co. vs. NLRB*, 568 F2d 436, 442 (5th Cir. 1978) the Court expressed the will of Congress:

> (5) It is indisputable that the thrust of the NLRA is not the protection of the union, not the protection of the employer, but rather the protection of the employee. Thus, a decision that would operate to the disadvantage of the employee is, at minimum, to be avoided.

2. The right to resign from union membership is a Congressional policy firmly imbedded in the NLRA.

Section 7 of NLRA, 29 USC 157 provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, *and shall also have the right to refrain from any or all of such activities* except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 158(a) (3) of this Title. (Emphasis added)

Section 7 of NLRA is the heart of the Act. Standing alone it clearly fixes the right of each individual employee to be a union member or to refrain from being a union member. This Court has recognized this right to resign from membership. *NLRB vs. Textile Workers Local 1029, Granite State*, 409 U.S. 213 (1972); *Booster Lodge No. 405, I.A.M. vs. NLRB*, 412 U.S. 84 (1973).

The only exception is that union membership may be required as a condition of employment by agreement between employer and union—and this exception does not require "full membership" but only the payment of uniformly levied initiation fees and dues during the term of the union-employer agreement. Section 8(a) (3) NLRA, 29 USC 158(a) (3). If Congress had intended to give the union authority to require continued union membership it would have stated such an additional exception in Section 7. There is no exception. There is no limitation as to time.

The union, however, argues that the Section 8(b) (1) (A) proviso grants to the union the authority to require

continued membership so that once an individual employee becomes a member, he may not resign that membership and thus free himself from the discipline of the union. The words of the proviso clearly do not support the union's position.

Section 8(b) (1) (A) NLRB, 29 USC 158(b) (1) (A) provides that it shall be an unfair labor practice for a labor organization or its agents:

> (1) To restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 157 of this title: *provided* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; • • •.

The proviso obviously permits a union to establish rules stating the conditions which must be met by an employee to acquire membership in the union. Typical of such conditions may be: payment of initiation fee; signing an application; progressing to journeyman status through an apprenticeship; passing a skill test (in certain skill trades); being eighteen (18) years of age or older; being licensed in a certain trade such as barber, truck driver, electrician, plumber, etc.

The proviso also obviously permits a union to establish rules which the member must meet if he wishes to retain his membership. Typical of such conditions may be: prompt payment of dues; attend regular membership meetings; display a union membership identification during working hours; maintain licenses required by law; honor a picket line; etc. In other words the member must continue to meet the requirements of the internal rules

if he wishes to *retain* his membership. If he fails to meet the union requirements, he may be unable to retain his membership—he may be expelled.

The proviso certainly does not authorize a union to establish a rule which forces a member to remain a member forever subject to the discipline of the union. Neither may it require him to remain a member during a particular period of time so that he will be subject to the discipline of the union.

Congress used the identical words in two (2) other subsections of Section 8 of the Act. Section 8(a) (3) permits the employer and the union to make an agreement which requires union membership as a condition of employment "Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization • • • (B) if he has reasonable grounds for believing that membership was *denied or terminated* for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of *acquiring or retaining membership.*" (Emphasis added) Section 8(b) (2), 29 USC 158(b) (2) makes it an unfair labor practice for a union "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this Section or to discriminate against an employee with respect to whom membership in such an organization has been *denied or terminated* on some ground other than his failure to tender the periodic dues and initiation fees uniformly required as a condition of *acquiring or retaining* membership." (Emphasis added) Congress used the word "retained" and "retaining" to mean

"to keep" in each of the three (3) paragraphs. There is no room to give any other meaning to the word.

The universally accepted meaning of the word "retain" is "to keep; to hold in possession". Clearly Congress used the word in its usual meaning. The union can establish rules which the member must meet in order to acquire and to retain—keep—his membership, not rules which require him to remain a member against his wishes and consequently subject to the discipline of the union.

Legislative History does not support the union's position. As a matter of fact, there is very little reference to the language here under consideration, but it does not support the union's position. The legislative history of Section 7 of the Act (29 USC 157) supports the contention of this Respondent. According to Senator Taft the phrase "the right to refrain from any or all such activities" was added to Section 7 of the Senate Bill to make the prohibition contained in Section 8(b) (1), 29 USC 158(b) (1) apply to coercive acts of unions against employees who did not wish to join or did not wish to participate in a strike or picket line. 93 Congressional Record 6859, II Legislative History 1623. After the proviso had been added to 8(b) (1) (A), Senator Taft also said that it "would not outlaw anybody striking who wanted to strike. • • • All it would do would be to outlaw such restraint and coercion as would prevent people from going to work if they wished to go to work". 93 Congressional Record 4436, II Legislative History 1207.

Obviously a union member wishing to return to work would be subject to the restraint and coercion of a union disciplinary rule prohibiting his return to work if at the

same time he was not free to resign that membership to escape the restraint and coercion of the disciplinary rule.

The union's attempt to place some significance to the fact that Section 8(b) (1) and (c) (4) of the House Bill was omitted from the Conference Bill is not supportive of the union's position. When HR 3020 came to the floor of the House, Congressman Hoffman said that the clear meaning of Section 7(a) language: "employees • • • shall also have the right to refrain from any or all such activities" meant that the employee would "have the right to join or not join, to be bound by or not be bound by, union rules". 93 Congressional Record 3572, 3612 (1947). Legislative History 669, 733. When HR 3020 passed the House, it also contained Section 8(b) (1) and 8(c) (4). Section 8(b) (1) made it an unfair labor practice "• • • to compel or seek to compel any individual to become or remain a member of any labor organization". Section 8(c) (4) made it an unfair labor practice for a union "(4) to deny to any member the right to resign from the organization at any time". Legislative History 51-53, 178-180. The Senate Bill, Section 8(b) (1) used broader terms making it an unfair labor practice "to restrain or coerce (A) employees in the exercise of their rights guaranteed in Section 7". Legislative History 226, 239. The conferees adopted the Senate Bill almost entirely. The House Conferees, however, considered their more detailed guarantee of the right to resign from membership to be contained in the broader Senate language, and therefore afforded even greater protection. "From the above description of the House Bill and the Senate amendment dealing with unfair labor practices on the part of labor organizations and their agents, it is apparent that the Senate amend-

ment was *broader* in its scope than the corresponding provisions of the House Bill". HR Conference Report No. 510, 80th Congress, First Section, 1, 7, 42-44 (1947). Legislative History 505, 511, 546-548. (Emphasis added). But the House did not just rely on this Conference Report. While it accepted the broader language of 8(b) (1), it insisted upon explicit language in Section 7 guaranteeing the right to refrain from any or all union activity. Senator Taft explained that the reason for the right to refrain language was:

> • • • that similar language had appeared in the House Bill and since Section 8(b) (1) of the Senate Bill, which was retained by the conferees, made it an unfair labor practice for a labor organization to restrain or coerce employees in the rights guaranteed them in Section 7, the House conferees insisted that there be express language in Section 7 *which would make the prohibition contained in Section 8(b) (1) apply to coercive acts of unions against employees who did not wish to join or did not care to participate in a strike or a picket line.* (Emphasis added) 93 Congressional Record 7000-7001 (June 12, 1947) Legislative History 1622-1623.

Senator Holland, in proposing the proviso language, described it as having to do with the "admission or the *expulsion* of members". (Emphasis added) 93 Congressional Record 4387, 4398, April 30, 1947, Legislative History 1129, 1139. In other words the union could adopt internal rules which a member must meet for retention of his membership and if he failed to comply with those rules he could be expelled from membership. It has nothing whatsoever to do with the right to refrain from or resign from union membership.

Nowhere in the Legislative History is there any statement to support the union position that under the proviso of Section 8(b) (1) (A) it can prohibit an individual employee from resigning from full membership at any time.

3. The union's common law and solidarity theories are not supportable.

The union's brief, pages 36-38, appears to abandon its reliance on the proviso of Section 8(b) (1) (A) and to theorize that the union has a common law right to adopt and enforce "League Law 13" prohibiting the resignation or withdrawal of a member during a strike or when one is imminent. The union overlooks or ignores the fact that the matter is governed by statute: the National Labor Relations Act, as amended. Section 7 of the Act (Section 29 USC 157) clearly provides: "Employees shall have the right to • • • join, or assist labor organizations, • • •, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a) (3)". Section 7 clearly governs the right to join and to resign from membership.

The bottom line of the union's Brief (page 38) and the entire argument of the Amicus Curiae Brief of Teamsters For a Democratic Union is based upon the theories of mutual reliance and solidarity. Both theories have been disposed of by this Court.

This Court gave "little weight" to the mutual reliance theory in *NLRB vs. Textile Workers, Granite State,* 409 U.S. at 217.

In *Granite State,* Id. at 218, this Court stated that employees' "Section 7 rights are not lost by a union's plea for solidarity or by its pressures for conformity and submission to its regime". Burger, C.J. concurring, adds: "[T]he institutional needs of the union, important though they are, do not outweigh the rights and the needs of the individual".

4. The decision of the Seventh Circuit is consistent with and supported by the decisions of this Court.

In *NLRB vs. Allis-Chalmers Mfg. Co.,* 388 U.S. 175 (1967) this Court held that the union did not violate Section 8(b) (1) (A) of NLRA when it levied and collected by court action fines against full members of the union who returned to work during a strike. In so doing the court pointed out that a union shop agreement under Section 8 (a) (3) and 8(b) (2) could require not full membership but only the tender of uniformly required initiation fees and dues. See also note 37. The court left open the question of whether or not the union could have imposed fines upon "financial core" employees.

In *Scofield vs. NLRB,* 394 U.S. 423 (1969) this Court held that a union rule imposing a ceiling on production for which its members would accept piece work pay is valid and that enforcement by fines did not violate Section 8(b) (1) (A). In *Scofield,* Id. at 430, the Court held that Section 8(b) (1) "leaves a union free to enforce a properly adopted rule which reflects a legitimate union interest, *impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced against members who are free to leave the union and escape the rule.*" (Emphasis added) To this the Court added, at 435: "If a

member chooses not to engage in this concerted activity and is unable to prevail on the members to change the rule, *then he may leave the union* and obtain whatever benefits in job advancement and extra pay may result from the extra work * * *". (Emphasis added)

In *NLRB vs. Textile Workers Local 1029, Granite State Joint Board,* 409 U.S. 213 (1972) this Court held that the union had violated Section 8(b) (1) (A) when it fined thirty-one (31) employees who, after participating in the strike vote and the resolution that fines be levied against anyone crossing the picket line, resigned their membership and returned to work. The Court stated: "*[W]hen there is a lawful dissolution of a union-member relation, the union has no more control over the former member than it has over the man in the street*". *Granite State,* Id. (Emphasis added) The concurring opinion of Chief Justice Burger added: "I join the Court's opinion because for me the institutional needs of the union, important though they are, do not outweigh the rights and the needs of the individual. * * * *Where the individual employee has freely chosen to exercise his legal right to abandon the privileges of union membership, it is not for us to impose the obligations of continued membership. Granite State,* Id. 218. (Emphasis added)

The Court outlined some events which may influence a member's decision and observed that the union had no rule specifically permitting or denying resignations from membership. *Granite State,* Id. 217-218.

In *Booster Lodge No. 405, I.A.M. vs. NLRB,* 412 U.S. 84 (1973) this Court found that the union violated Section 8(b) (1) (A) when it fined employees who resigned

from membership and returned to work during a strike, even though the union's constitution expressly prohibited members from returning to work during a strike. There was no constitutional provision permitting or forbidding such resignation. But the Court said "[W]e are no more disposed to find an implied post-resignation commitment from the strike breaking proscription in the union's constitution here than we were to find it from the employees' participation in the strike vote and ratification of penalties in *Granite State*". *Booster Lodge,* Id. 89. "And here, as there (*Granite State*) we leave open the question of the extent to which contractual restriction on a member's right to resign may be limited by the Act. *Booster Lodge,* Id. 88.

The Court below was confronted with that question, and the opening paragraph of its decision reads:

> The issue squarely confronting us is whether a union in its constitution may deny its members the opportunity to resign from the union during a strike or when a strike is imminent. The United States Supreme Court twice has acknowledged, but has not been required to decide, this issue. *Booster Lodge No. 405 vs. NLRB,* 412 U.S. 84, 88-90 (1973); *NLRB vs. Granite State Joint Board, Textile Workers Union, Lodge 1029,* 409 U.S. 213, 217 (1972). We find such a rule invalid.

In a recent decision the National Labor Relations Board reviewed the above decisions at length and concluded that any restrictions placed by a union on its members' right to resign are unlawful. *Machinists, Local Lodge 1414, Neufeld Porsche-Audi,* 270 NLRB No. 209, June 22, 1984, 116 LRRM 1257.

CONCLUSION

We submit that the union's League Law 13 (which prohibits the resignation of a member during a strike or when a strike appears imminent) impairs fundamental policies imbedded in the National Labor Relations Act by Congress; is contrary to the express language and consistent interpretation of Section 7, NLRA; illegally denies its members the freedom to leave the union and escape its discipline; and violates Section 8(b) (1) (A).

For the foregoing reasons we respectfully urge that the judgment below be affirmed.

Respectfully submitted,

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No. 83-1894

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PATTERN MAKERS' LEAGUE OF NORTH AMERICA, AFL-CIO, *et al.*,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF FOR THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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December 17, 1984

QUESTION PRESENTED

Are employees unlawfully restrained in the exercise of their federal statutory right to refrain from concerted activity by an internal union rule, enforceable by court-collectible fines, which prohibits them from resigning from union membership during a strike or lockout or when one appears imminent?

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BRIEF FOR THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

This amicus curiae brief for the National Right to Work Legal Defense Foundation ("Foundation") is filed with the written consent of all parties. Sup. Ct. R. 36.2. It supports the position of respondents that the decision of the court of appeals, enforcing an order of the National Labor Relations Board, should be affirmed.

INTEREST OF THE AMICUS CURIAE

The Foundation is a charitable, legal aid organization formed to protect the right to work, freedoms of association and speech, and other fundamental liberties of ordinary working men and women from infringement by compulsory unionism. As such, the Foundation aids employees who have been denied, or coerced in the exercise of, their right to refrain from becoming or remaining formal union members subject to discipline—the statutory right at stake in this case.

The Foundation is providing legal assistance to individual employees in more than twenty cases in which a union relies upon a restriction upon resignations to justify punishment of the employees for returning to work during a strike. Two of those cases are now before the Court on petitions for certiorari from a decision directly contrary to that of the court of appeals in this case. *NLRB v. Machinists Local 1327*, 725 F.2d 1212 (9th Cir. 1984), *petitions for cert. filed*, 53 U.S.L.W. 3291, 3301 (U.S. Sept. 27, Oct. 1, 1984) (Nos. 84-494, 84-528). The individual employees fined for returning to work during the strike are not parties to this case. Therefore, the Foundation submits this brief to ensure that the Court will have the views of those persons whose freedom of association and economic livelihood are directly and adversely affected by union rules restricting resignations.

STATEMENT OF THE CASE

This case is before the Court to review a decision of the United States Court of Appeals for the Seventh Circuit

enforcing an order of the National Labor Relations Board ("Board"). The Board and court of appeals found that the Pattern Makers' League of North America, AFL-CIO, and its Rockford and Beloit Associations (collectively "the union") violated section 8(b)(1)(A) of the National Labor Relations Act ("the Act" or "the NLRA"), 29 U.S.C. § 158(b)(1)(A) (1982), by imposing court-collectible fines on ten employees as punishment for resigning from the union and returning to work during a strike. A provision of the union's constitution which prohibits members from resigning during a strike or lockout, or when a strike or lockout appears imminent, was held to be unenforceable under the Act.

The material facts are stated in the decisions of the Board and its Administrative Law Judge. Appendix to Petition for Cert. ("App.") at 10a-11a, 14a-16a, 27a-32a. Two important facts are not mentioned in the union's statement of the case. First, the collective-bargaining agreements between the union and the employers, both before and after the strike, contained compulsory-unionism clauses which required union membership as a condition of employment. *Id.* at 11a, 14a & n.8, 16a n.13. Second, the union insisted that employees Nelson and Kohl become full members, not just pay dues, in order to comply with this requirement. *Id.* at 15a-16a & nn.12-13, 29a.

SUMMARY OF ARGUMENT

The most fundamental purpose of the NLRA, 29 U.S.C. §§ 151-69 (1982), is to protect the freedom of individual employees to associate or not to associate in labor

unions. The courts, including this Court in a trio of earlier decisions, have uniformly held that the right to refrain from union membership guaranteed by § 7 of the Act includes the right of a member to resign.

Moreover, although the Court did not decide the precise issue in those earlier decisions, the principles established by those cases, and the rules of statutory construction, mandate the conclusion that a proviso to § 8(b)(1)(A) protecting the right of unions to prescribe membership criteria must be construed to disallow any union rule prohibiting resignations. The enforcement of such a rule through court-collectible fines is unlawful restraint and coercion, because the rule (1) impairs the fundamental congressional policy of employee freedom of association and (2) is one which employees cannot escape by leaving the union.

This conclusion is supported by the legislative history of the Labor Management Relations (Taft-Hartley) Act, 1947, Pub. L. No. 80-101, 61 Stat. 136 (1947), which added the statutory provisions involved here to the NLRA. That history shows not that Congress intended to preserve a common-law power of unions to restrict the right of members to withdraw, but rather that Congress meant to guarantee employees a right to resign and return to work during a strike.

That union membership under the NLRA is not voluntary in the common-law sense further indicates that union rules restricting resignations are unenforceable under the Act. In this case, the labor contract required union membership as a condition of employment; and the union did not give employees the option of paying dues without

becoming formal members. Moreover, in the general case, the status of a union as exclusive representative itself coerces membership. Thus, the union constitution is a contract of adhesion which it is unconscionable to enforce against an employee who, out of economic necessity, resigns to return to work during a strike.

ARGUMENT

I. A Union Rule Prohibiting Resignations Frustrates the Act's Overriding Policy of Protecting Employee Freedom of Association

"It is indisputable that the thrust of the NLRA is not the protection of the union, not the protection of the employer, but rather the protection of the employee." *Mosher Steel Co. v. NLRB*, 568 F.2d 436, 442 (5th Cir. 1978). The Act does not foster union membership *per se*, but guarantees employees the right to self-determination as to union membership.

The congressional declaration of policy in section 1 of the Act establishes the protection of employee freedom of association as a fundamental purpose of the statute:

> It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and *by protecting the exercise by workers of full freedom of association*, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating

> the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C. § 151 (emphasis added). Congress emphasized the specific importance of employee freedom of choice vis-a-vis labor unions in section 1(b) of the Labor Management Relations (Taft-Hartley) Act, 1947, amending the NLRA, which declares that it is "the purpose and policy" of the Act, "in order * * * to protect *the rights of individual employees in their relations with labor organizations* whose activities affect commerce, to define and proscribe practices on the part *of labor* and management which affect commerce and are inimical to the general welfare." 29 U.S.C. § 141(b) (emphasis added).[1]

Indeed, this Court has viewed protection of employee freedom of association as *the* overriding purpose of the Act. In *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 280 (1956), the Court said that the two declared policies of the Act, to preserve a competitive business economy and to protect the rights of labor to organize, "depend for their foundation upon assurance of 'full freedom of association.' *Only after that is assured* can the parties turn to effective negotiation as a means of maintaining 'the normal flow of commerce and . . . the full production of articles and commodities . . . .'"

Section 7 implements the Act's basic purpose by guaranteeing individual employees "the right to refrain from

[1] Section 1(b) of Taft-Hartley is important here because the "right to refrain" language of 29 U.S.C. § 157, and the whole of 29 U.S.C. § 158(b)(1)(A), were added to the NLRA by Taft-Hartley. Pub. L. No. 80-101, sec. 101, 61 Stat. 136, 140-41 (1947). The NLRA is a subchapter of the Taft-Hartley Act, 29 U.S.C. §§ 141-87 (1982).

any or all" union and other concerted activities, "except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section [8](a)(3)." 29 U.S.C. § 157 (emphasis added). But a compulsory-unionism agreement authorized by § 8(a)(3) can require only "financial core" membership—the payment of dues and fees—not *full* union membership subject to union rules and discipline. *NLRB v. General Motors Corp.*, 373 U.S. 734, 742-43 (1963); *see* 29 U.S.C. § 158(a)(3), (b)(2). Thus, the right to refrain includes the right of an employee to refuse in the first instance to become a full, formal member of a union. *NLRB v. Gold Standard Enterprises, Inc.*, 679 F.2d 673, 677 (7th Cir. 1982); *NLRB v. Hershey Foods Corp.*, 513 F.2d 1083, 1085-87 (9th Cir. 1975).

The union concedes this, but argues that § 7 does not protect the right to *resign* union membership, once acquired. Brief for Petitioners ("Pet.") at 33. This argument is untenable, however, in the face of *Machinists Booster Lodge 405 v. NLRB*, 412 U.S. 84 (1973) (per curiam), and *NLRB v. Textile Workers Local 1029 (Granite State)*, 409 U.S. 213 (1972), which held that a union commits an unfair labor practice where it fines employees who lawfully resign from membership before returning to work for a struck employer.

Booster Lodge described *Granite State* as "concluding that the members were free to resign at will and that § 7 of the Act protected *that right* to return to work during a strike which had been commenced while they were union members." 412 U.S. at 87-88 (emphasis added)

(citation & footnote omitted); *see Granite State*, 409 U.S. at 216. And in both cases, Justice Blackmun specifically referred to the "§ 7 right to resign from the union and to return to work without sanction." *Booster Lodge*, 412 U.S. at 91 (Blackmun, J., concurring); *Granite State*, 409 U.S. at 222 (Blackmun, J., dissenting).

As the Board has long held, "the withdrawal by employees from a union [is] an act not qualitatively different from the refusal by employes [*sic*] *to join* a union." *Marlin Rockwell Corp.*, 114 N.L.R.B. 553, 560 (1955). It follows that the right to refrain encompasses the right, once having joined, to resign from full membership, as the conflicting court of appeals' decisions in this case and in *Machinists Local 1327* recognized. App. at 5a; *Machinists Local 1327*, 725 F.2d at 1217.

Because § 7 does *not* say that the right to refrain exists except as limited by union rules, the union seizes upon § 8(b)(1). The latter section makes it an unfair labor practice for a labor organization "to restrain or coerce (A) employees in the exercise of the rights guaranteed in section [7] of this [Act]: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein • • • ." 29 U.S.C. § 158(b)(1)(A). The fallacy in the union's position, though, is that the § 8(b)(1)(A) proviso must be construed so as not to deny § 7 rights of individual employees.

"Provisos and exceptions in statutes must be strictly construed and limited to objects fairly within their terms,

since they are intended to restrain or except that which would otherwise be within the scope of the general language." *Detroit Edison Co. v. SEC*, 119 F.2d 730, 739 (6th Cir.), *cert. denied*, 314 U.S. 618 (1941). This principle has been applied to other NLRA provisos which trench on the right of employees to choose between union membership and non-membership. *See, e.g., NLRB v. Electric Vacuum Cleaner Co.*, 315 U.S. 685, 694-95 (1942); *NLRB v. Radio Officers' Union*, 196 F.2d 960, 964 (2d Cir. 1952), *aff'd*, 347 U.S. 17 (1954). Consistency of statutory interpretation requires its application here.

On its face, the proviso to § 8(b)(1)(A) merely privileges a union to set the terms on which an individual may acquire and retain full membership, but grants *no* power to prevent an employee from refusing to join or from leaving the union. *Marlin Rockwell*, 114 N.L.R.B. at 561-62. The common understanding of the phrase "rules with respect to the acquisition or retention of membership" supports this construction. For example, in *Machinists v. Gonzales*, 356 U.S. 617, 620 (1958), this Court described a controversy as to the legality of an employee's *expulsion* from membership as "precisely one that gives legal efficacy under state law to the rules prescribed by a labor organization for 'retention of membership therein.'" Similarly, *Price v. NLRB*, 373 F.2d 443, 447 (9th Cir. 1967) (emphasis added), *cert. denied*, 392 U.S. 904 (1968), held "that, at the least, the proviso was intended to permit the union to *suspend* or *expel* a member who [attacks the union's position as bargaining agent]." And, *NLRB v. Machinists District Lodge 99*, 489 F.2d 769, 772 (1st Cir. 1974) (emphasis added), said

that "the proviso of § 8(b)(1)(A) preserves a union's most basic power: that of *granting* or *withholding* membership."

The privilege to grant or withhold membership to or from an employee who wishes to be a member does not include the power to *require continuation* of membership by an unwilling employee. The contrary interpretation would allow the proviso to eviscerate the more fundamental policy to which it is only a limited exception. And that would contravene the test this Court has established for determining the lawfulness of attempts to enforce union rules: "§ 8(b)(1) leaves a union free to enforce a properly adopted rule which reflects a legitimate union interest, *impairs no policy Congress has imbedded in the labor laws*, and is reasonably enforced against union members *who are free to leave the union and escape the rule*." *Scofield v. NLRB*, 394 U.S. 423, 430 (1969) (emphasis added).[2]

[2] This Court relied on the *Scofield* test in *Granite State*, 409 U.S. at 216, and the court of appeals found it dispositive here, App. at 4a-5a, 8a. Even *Machinists Local 1327*, 725 F.2d at 1216, recognized that this test should be used in determining the lawfulness of a union prohibition on resignations, although the Ninth Circuit misstated and misapplied it. Nonetheless, the union argues that *Scofield* formulated the test only for "union rules that address the substance of what union members may do," and, therefore, it "does not apply to a rule that does no more than state * * * at what times an individual may resign membership." Brief for Pet. at 34 n.13 (emphasis omitted). The suggestion that a rule prohibiting exercise of the statutory right to resign during strike periods is merely procedural is disingenuous, to say the least! *See* App. at 8a. Moreover, the *Scofield* test clearly applied to procedural rules, as it was derived in part from *NLRB v. Marine Workers*, 391 U.S. 418 (1968). In that case the Court held that a union could not enforce a rule "requiring a member to exhaust union remedies before filing an unfair labor practice charge." *Scofield*, 394 U.S. at 429-30. An exhaustion requirement, or course, *is* a procedural rule.

A union constitutional provision prohibiting resignation, either absolutely or (as here) at certain times, fails the *Scofield* test in two respects. First, it impairs the fundamental congressional policy of protecting the full freedom of association of individual employees with regard to formal union membership, as the Seventh Circuit held. App. at 6a-7a. "Although the unions in *Granite State* and *Booster Lodge* did not restrict resignations, the Court's reasoning applies equally here." *Id.* at 5a. Regardless of whether what an employee orginally "endorsed" was membership or a strike, "the vitality of § 7 requires that the member be free to refrain in November from the actions he endorsed in May and that his § 7 rights are not lost by a union's plea for solidarity or by its pressures for conformity and submission to its regime." *Granite State*, 409 U.S. at 217-18.

Second, a provision prohibiting resignation from membership does not leave the employee "free to leave the union and escape the rule," as required by *Scofield*, 394 U.S. at 430. The union, like the Ninth Circuit in *Machinists Local 1327*, conveniently overlooks this phrase. Brief for Pet. at 34 n.12; *see Machinists Local 1327*, 725 F.2d at 1216. However, as the court of appeals held in this case, the "escape the rule" language is not mere surplusage, but a separate, fundamental element of the test which must be met if a union rule is to be enforceable. App. at 8a.[3] Indeed, in applying its test in *Scofield*, the

[3] The Seventh Circuit is not alone in applying *Scofield* in this way. *See Helton v. NLRB*, 656 F.2d 883, 893-96 (D.C. Cir. 1981); *NLRB v. Oil Workers Local 6-578*, 619 F.2d 708, 712-13 (8th Cir. 1980); *National Cash Register Co. v. NLRB*, 466 F.2d 945, 958-59 (6th Cir. 1972), *cert. denied sub nom. NCR Employees' Indep. Union v. NLRB*, 410 U.S. 966 (1973).

Court explicitly stated that a union rule establishing production ceilings for members could be enforced lawfully through fines only because, "[i]f a member chooses not to engage in this concerted activity and is unable to prevail on the other members to change the rule, *then he may leave the union* and obtain whatever benefits in job advancement and extra pay may result from extra work * * * ." 394 U.S. at 435 (emphasis added). Self-evidently, this language applies to the situation here, where the union rule purports to deny employees any right to work at all.

Refusing to acknowledge that members must be "free to leave the union and escape the rule," the union and its amicus, Teamsters for a Democratic Union ("TDU"), rationalize restrictions on the right to resign during strike periods because they "protect the common interest of maintaining a united front during the most critical time a union faces." Brief for Pet. at 38; *accord* Brief of TDU *passim*. Thus, relying on "the presence of boilerplate provisions in a union's constitution," *Granite State*, 409 U.S. at 220 (Blackmun, J., dissenting), the unions, and the Ninth Circuit in *Machinists Local 1327*, have revived the doctrines of "mutual reliance" and "union solidarity" which this Court explicitly and categorically rejected in *Granite State*, 409 U.S. at 217-18.

In short, although this Court did not decide the precise question in *Scofield, Granite State*, and *Booster Lodge*, the Seventh Circuit correctly concluded that those decisions implicitly teach that the proviso to § 8(b)(1)(A) does not authorize the enforcement, through court-collectible fines, of a union constitutional provision

abrogating the § 7 rights of individual employees to resign from union membership and then refrain from participating in a strike.

II. The Legislative History of the Act Demonstrates That Congress Intended to Protect the Right of Employees to Resign and Work During A Strike

Perhaps realizing the force of those precedents against it, the union deals little with *Scofield, Granite State*, and *Booster Lodge* in its brief. The bulk of its argument is devoted to a convoluted, distorted, and sometimes irrelevant discussion of the legislative history of the Taft-Hartley Act, Pub. L. No. 80-101, 61 Stat. 136 (1947). The union contends that that history shows that Congress intended the § 8(b)(1)(A) proviso to preserve intact a common-law power of unions, as "voluntary associations," to place contractual restrictions on the right of members to withdraw. In fact, the debates reflect no congressional belief that common-law principles would permit provisions in union constitutions to override the NLRA's explicit, fundamental statutory policy of protecting full employee freedom of association.

The bill which became Taft-Hartley was introduced in the House of Representatives as H.R. 3020. When reported from committee, H.R. 3020 included the "right to refrain" language in § 7. The Minority Report objected that this represented a change from the common law of contracts, saying that the right of employees to associate in unions

> is a natural right that exists and existed prior to

> passage and independent of the National Labor Relations Act. The bill would seriously compromise this natural right by the addition of language purporting to guarantee a specious right "to refrain from any and all such activity." The amendment to the present guaranty is unnecessary and illogical and can only lead to a serious increase in litigation and controversy. *Long-established contractual relationships* and mutually satisfactory bargaining arrangements of the vast majority of American industry *are made prey to the whims and caprice of malcontents.*

H.R. Rep. No. 245, 80th Cong., 1st Sess. 75 (1947), *reprinted in* Legis. Hist. at 292, 366 (emphasis added).[4]

Similarly, when Senator Ball proposed to amend the Senate version of the bill, S. 1126, to prohibit labor unions from coercing "employees in the exercise of the rights guaranteed in section 7," Senator Pepper argued that this was "unnecessary" because workers were already "protected by law, by the law of the land, against coercion." Senator Taft responded that the amendment was necessary because there was then "no law of any State" protecting employees who do not wish to be union members from "methods of coercion short of actual physical violence."[5] 93 Cong. Rec. 4136, 4145 (daily ed.

[4] "Legis. Hist." references are to Subcomm. on Lab. of the Sen. Comm. on Lab. & Pub. Welfare, 93d Cong., 2d Sess., *Legislative History of the Labor Management Relations Act, 1947* (1974).

[5] Senator Ball, sponsor of section 8(b)(1)(A), included "retaliatory disciplinary action by union leadership against employees" as an example of the type of union coercion the new law was designed to prevent. 93 Cong. Rec. 4549, 4559 (daily ed. May 2, 1947), *reprinted in* Legis. Hist. at 1182, 1199-1200. Court-collectible fines are an inherently coercive

Apr. 25, 1947), *reprinted in* Legis. Hist. at 1017-18, 1030-31. Significantly, *even after the union-rules proviso had been added* to § 8(b)(1)(A), Senator Morse opposed the new section because he believed it "would tremendously extend Federal power into areas that have heretofore been regarded as the sole concern of State, county, and local authorities." 93 Cong. Rec. 4549, 4554 (daily ed. May 2, 1947), *reprinted in* Legis. Hist. at 1182, 1191.

The legislative history of Taft-Hartley shows more than that Congress generally intended to guarantee employees' associational rights to an extent greater than had previous law. In *NLRB v. Allis-Chalmers Manufacturing Co.*, 388 U.S. 175 (1967) (5-4 decision), this Court narrowly divided as to whether Congress meant to permit unions to fine *full members* for strikebreaking. But the congressional debates do indicate that a specific purpose of the 1947 amendments was to protect the right of employees to *resign* their union membership and return to work during a strike.

Shortly after H.R. 3020 was reported in the House, Representative Hoffman commented that the words of § 7(a) declaring that "the employee shall have the right—'to refrain from any and all such activity' * * * meant simply that a man should have the right to join or not to join, to be bound by *or not to be bound by, union*

form of economic reprisal. *Machinists Booster Lodge 405*, 185 N.L.R.B. 380, 381 (1970), *enforced in pertinent part*, 459 F.2d 1143 (D.C. Cir. 1972), *aff'd*, 412 U.S. 84 (1973). Thus, this case is clearly distinguishable from *NLRB v. Teamsters Local 639*, 362 U.S. 274 (1960), in which the conduct at issue was mere peaceful picketing, and there was no legislative history directly supporting the Board's interpretation of the phrase "restrain or coerce."

rules." 93 Cong. Rec. 3572, 3612 (daily ed. Apr. 16, 1947), *reprinted in* Legis. Hist. at 669, 733 (emphasis added). Logically, the right not to be bound by union rules is meaningless if an employee, once he joins a union, is locked into obeying its rules by a rule prohibiting resignation. Because the bill's supporters understood this, H.R. 3020 as it passed the House included a section 8(b)(1) making it an unfair labor practice for unions, "by intimidating practices, to interfere with the exercise by employees of rights guaranteed in section 7(a) or to compel or seek to compel any individual *to become or remain* a member of any labor organization." H.R. 3020, 80th Cong., 1st Sess. § 8(b)(1) (Apr. 18, 1947), *reprinted in* Legis. Hist. at 158, 178-79 (emphasis added).

The bill passed by the Senate made it unlawful for a union "to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7," and included the union-rule proviso. H.R. 3020, 80th Cong., 1st Sess. § 8(b)(1) (May 13, 1947), *reprinted in* Legis. Hist. at 226, 239. The House members of the conference committee agreed to the Senate language in § 8(b)(1). However, their acceptance of the omission of the redundant second clause of the House bill did not mean that the section no longer protected the right to resign from union membership, or for that matter the right to refuse to join a union in the first instance. On the contrary, the report of the House conferees explained that the Senate language for § 8(b) was acceptable because it provided *greater* protections to individual employees than did the original House bill: "From the above description of the House bill and the Senate amendment dealing with unfair labor practices on the part of labor organizations

and their agents, it is apparent that the Senate amendment was *broader* in its scope than the corresponding provisions of the House bill." H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 1, 7, 42-44 (1947), *reprinted in* Legis. Hist. at 505, 511, 546-48 (emphasis added).

The House did not rely on this Conference Report alone to show that it intended the Act to protect the right of employees to resign from union membership and return to work during a strike. It insisted that, although it would accept the broader Senate language for § 8(b)(1), there must also be explicit language in § 7 guaranteeing the right to refrain from any or all union activity. Senator Taft explained what occurred in his supplementary analysis of the bill as passed:

> The reason for [inclusion of the right to refrain language] was that similar language had appeared in the House bill and since section 8(b)(1) of the Senate bill, which was retained by the conferees, made it an unfair labor practice for labor organizations to restrain or coerce employees in the rights gauranteed [*sic*] them in section 7, the House conferees insisted that there be express language in section 7 *which would make the prohibition contained in section 8(b)(1) apply to coercive acts of unions against employees who* did not wish to join or *did not care to participate in a strike or a picket line.*

93 Cong. Rec. 7000, 7001 (daily ed. June 12, 1947), *reprinted in* Legis. Hist. at 1622, 1623.[6]

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[6] Senator Taft apparently believed that the bill guaranteed the right to resign and return to work even without the "right to refrain" language. In the debate on Senator Ball's amendment to make union restraint and

Finally, the legislative history does not support the union's contention that the proviso to § 8(b)(1)(A) empowers unions to force employees to continue formal membership against their will. Rather, the debate concerning the proviso simply confirms the obvious: that § 8(b)(1)(A) allows unions to enforce internal rules establishing who may become a member and what conduct will disable one from retaining that status.

In offering the proviso as an amendment to the Ball amendment making union restraint and coercion of employees unlawful, Senator Holland said that he was proposing the proviso because "[a]pparently it is not intended by the sponsors of the [Ball] amendment to affect at least that part of the internal administration which has to do with the *admission* or the *expulsion* of members, that is with the questions of membership." 93 Cong Rec. 4387, 4398 (daily ed. Apr. 30, 1947), *reprinted in* Legis. Hist. at 1129, 1139 (emphasis added). Then, after declaring his willingness to accept the proviso, Senator Ball confirmed that there was no provision

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coercion of employees unlawful, he commented:

> Merely to require that unions be subject to the same rules that govern employers, and that they do not have the right to interfere with or coerce employees, *either their own members* or those outside their union, is such a clear matter, and seems to me so easy to determine, that I would hope we would all agree.

93 Cong. Rec. 4136, 4145 (daily ed. Apr. 25, 1947), *reprinted in* Legis. Hist. at 1017-18, 1032 (emphasis added). After the union-rule proviso had been added, Taft also said that the Ball amendment "would not outlaw anybody striking *who wanted to strike*. • • • All it would do would be to outlaw such restraint and coercion as would prevent people from going to work *if they wished to go to work*." 93 Cong. Rec. 4549, 4563 (daily ed. May 2, 1947), *reprinted in* Legis. Hist. at 1182, 1207 (emphasis added).

in the bill "which denies a labor union the right to prescribe the qualifications of its members," "to discriminate in respect to membership," to "expel [a member] from the union at any time it wishes to do so, and for any reason," to "admit to membership anyone it wishes to admit, and decline to admit anyone it does not wish to accept." *Id.* at 4400-01, *reprinted in* Legis. Hist. at 1141-42. *Nowhere* in the debates, however, did any member of Congress state that the proviso would give effect to a rule which prohibits individual employees from ending their formal membership in the organization.

Thus, when read in the light of the congressional declaration that the purpose of the Taft-Hartley Act is "to protect the rights of individual employees in their relations with labor organizations," 29 U.S.C. § 141(b), and the legislative history showing that Congress intended to protect the right of employees to resign and work during a strike, the proviso cannot be given the construction the union urges here.

III. A Union Prohibition Upon Resignation Is Unenforceable Because Union Membership Under the NLRA Is Not Wholly Voluntary

Underpinning the arguments of the union and the TDU is the assumption that, although employees may be subject to "union-security" agreements, they *voluntarily* become and remain full union members and, therefore, *voluntarily* agree to a union's constitutional restriction upon resignation. *See* Brief for Pet. at 35-38; Brief of TDU at 11-13, 16-17. This assumption is, however, at best, a fiction—and, most realistically, an untruth.

In *Allis-Chalmers*, the Court held that an apparently voluntary, full union member lawfully could be fined for working during a strike in violation of a union rule. 388 U.S. at 196-97; *see Scofield*, 394 U.S. at 428. However, the record there showed that the union-security clause on its face informed the employees that full membership was not a condition of employment; and the charging party "offered no evidence * * * that any of the fined employees enjoyed other than full union membership." *Allis-Chalmers*, 388 U.S. at 196.[7] In this case, distinguishably, the record does not contain the wording of the compulsory-unionism agreements, which the Board described as requiring "union membership." App. at 29a, 36a n.15. Moreover, the record does show that the union unlawfully required employees to become full, rather than simply "financial core," members as a condition of employment. *Id.* at 15a-16a & nn.12-13, 29a. Therefore, no assumption is warranted that the employees in this case were voluntary members.

Indeed, any assumption here should run *against* the union. In *Booster Lodge*, 412 U.S. at 88-90, the Court required the union to prove "that the employees * * * either knew of or had consented to any limitation on

[7] The rule of conduct in *Allis-Chalmers* was a prohibition on strike-breaking; the rule at issue here is a prohibition on resignations. *Allis-Chalmers* should be confined strictly to its facts, since it was a 5 to 4 decision in which the majority was provided by Justice White, who cautioned that "[t]here may well be some internal union rules which on their face are wholly invalid and unenforceable. * * * I am doubtful about the implications of some of [the] generalized statements [of the opinion written for the Court]." 388 U.S. at 198-99 (White, J., concurring); *see Granite State*, 409 U.S. at 215.

their right to resign" or on their post-resignation conduct. *Accord id.* at 91 (Blackmun, J., concurring).[8] Also, as the Board held in this case, the union has a fiduciary duty to inform employees in an unambiguous manner of their exact obligations under a union-security agreement. App. at 15a-16a & n.13; *accord NLRB v. Teamsters Local 291*, 633 F.2d 1295, 1298-99 (9th Cir. 1980); *see, e.g., Electrical Workers (IUE) Local 801 v. NLRB*, 307 F.2d 679, 683-84 (D.C. Cir.) (opinion by Burger, J.), *cert. denied*, 371 U.S. 936 (1962).

Similarly, the burden is on the union to show that employees were informed of their option of not being full members before it can claim the benefit of a restriction upon resignation. In *Retail Clerks International Association*, 226 N.L.R.B. 80, 89-90 (1976), the Board found that a union violated § 8(b)(1)(A) by fining employees who resigned and returned to work during a strike without giving the 60 days' notice required by the union's constitution. The employees had become members after being told that they were required to do so. There was no evidence that the employees were advised of the "financial core" option. The Board ruled that, "[u]nder the circumstances, it must be held that the employees joined under compulsion." The Board therefore concluded that obligations of formal membership, including the restriction upon resignation, were ineffective with regard to the employees. *See Buckley v. Television Artists (AFTRA)*, 496 F.2d 305, 312-13 n.5 (2d Cir.) (dictum), *cert. denied*, 419 U.S. 1093 (1974). This

[8] This burden is consistent with the rule that a waiver must be "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

case is squarely on point with *Retail Clerks*.[9]

Moreover, under the NLRA union membership is in a very real sense coerced even where there is no union-shop agreement. Exclusive representation

> extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees. • • • [O]nly the union may contract the employee's terms and conditions of employment, and provisions for processing his grievances; the union may even bargain away his right to strike during the contract term, and his right to refuse to cross a lawful picket line. The employee may disagree with many of the union decisions but is bound by them.

Allis-Chalmers, 388 U.S. at 180 (footnotes omitted). An employee who wishes to have any say over the terms and conditions of his employment must join the union to participate in the selection of the bargaining team and to vote on ratification of the contract. Under these circumstances his membership hardly equates with the purely consensual relationship governed by the common law of voluntary associations.

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[9] Many union-shop clauses use only the term "member" or "membership" to describe the employees' obligations; and unions often do not inform employees that as a matter of law these terms mean less than the colloquial meaning that the average employee understandably gives to them. T. Haggard, *Compulsory Unionism, the NLRB, and the Courts* 69-70 (Lab. Rel. & Pub. Pol'y Series No. 15, 1977); D. Heldman, J. Bennett, & M. Johnson, *Deregulating Labor Relations* 70-71 (1981); *see, e.g., Teamsters Local 302 v. Vevoda*, 587 F. Supp. 483, 484-85 (N.D. Cal. 1984).

Rather, as Chairman Van de Water and Member Hunter noted in *Machinists Local 1327*, the "'agreements' that result from union membership have accurately been termed contracts of adhesion." 263 N.L.R.B. 984, 991 n.48 (1982); *accord Teamsters Local 439*, 237 N.L.R.B. 220, 222-23 (1978); Wellington, *Union Fines and Workers' Rights*, 85 Yale L.J. 1022, 1054-55 (1976). A union member must take the union constitution as it is written. It is in no sense a contract entered into at arm's length by parties of equal bargaining power such that it can be assumed that both parties assented to the individual contractual provisions.

Like the terms of other contracts of adhesion, such as consumer contracts, provisions of union constitutions which are harsh or unfair to the party of lesser bargaining power, the member, should be considered unenforceable. *See* Wellington, *supra; see also Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965) (2-1 decision) (general doctrine of unenforceable adhesion contracts). The unconscionability of a union restriction upon the right to resign during a strike has been established already by the Court:

> Events occurring after the calling of a strike may have unsettling effects, leading a member who voted to strike to change his mind. The likely duration of the strike may increase the specter of hardship to his family; the ease with which the employer replaces the strikers may make the strike seem less provident.

Granite State, 409 U.S. at 217. The union provision at issue here is particularly harsh, as once a strike or lockout begins the member is *perpetually* prohibited from

resigning, no matter how long the dispute drags on.[10]

A union member who is aware of both his right to resign and a simple union prohibition on strikebreaking, and then returns to work during a strike without resigning, can with some justification be assumed to have voluntarily bound himself to the prohibition, as was done in *Allis-Chalmers*. But an employer who has joined or remained a union member under the compulsion of exclusive representation, and the deception and coercion of a misleading or misrepresented union-shop clause, in fairness should be held not bound by a union constitutional provision purporting to prevent him from leaving the union to escape punishment for strikebreaking. "To hold otherwise is to resurrect the discredited doctrine of mutual reliance and liken the member, as the union [unsuccessfully] urged in *Granite State*, to a 'volunteer for military service' who 'is under strict discipline for the duration.'" Wellington, *supra* p. 23, at 1044. Such a result would contravene the Act's overriding policy of protecting employee freedom of association, a policy embodied in the statutory language, the legislative history, and the decisions of this Court.

CONCLUSION

The Board has correctly held that "a union may not lawfully restrict the right of its members to resign from membership," and that a court-collectible fine predicated

[10] The heavy burden the union's prohibition on resignation places on employees is illustrated by this case, in which the strike lasted more than seven months. None of the fined employees resigned and went back to work until the strike was in its fifth month. App. at 27a-28a.

on such a restriction violates § 8(b)(1)(A) of the Act. *Machinists Local 1414*, 270 N.L.R.B. No. 209, slip op. at 17-18 (1984) (3-1 decision). Therefore, and upon that fundamental ground, the judgment of the Seventh Circuit enforcing the Board's order in this case should be affirmed.

Respectfully submitted,

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No. 83-1894

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PATTERN MAKERS' LEAGUE OF NORTH AMERICA, AFL-CIO, AND ITS ROCKFORD AND BELOIT ASSOCIATIONS,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

AND

ROCKFORD-BELOIT PATTERN JOBBERS ASSOCIATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

AMICUS CURIAE BRIEF ON BEHALF OF SAFEWAY STORES, INCORPORATED; CALIFORNIA PORSCHE-AUDI; SAN FRANCISCO AUTO CENTER; EUROPEAN MOTORS, LTD.; LUCAS DEALERSHIP GROUP; AND LYNCH COMMUNICATIONS SYSTEMS, INC. IN SUPPORT OF AFFIRMANCE

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The Daily Record Co., Baltimore, MD 21202

QUESTION PRESENTED

Whether the National Labor Relations Board and the United States Court of Appeals for the Seventh Circuit properly found that a union rule that restricts members from resigning from the union during a strike impermissibly abridges the statutory right of employees to refrain from engaging in union activities, and is therefore violative of Section 8(b)(1)(A) of the National Labor Relations Act, *as amended*.

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IDENTIFICATION OF PARTIES SUPPORTED

This *amicus curiae* brief is filed in full support of the positions asserted by the National Labor Relations Board (hereinafter referred to as "the NLRB" or "the Board") and by the Rockford-Beloit Pattern Jobbers Association (hereinafter referred to as "the Association" or "the

Employers"), the Respondents in this case.[1] We respectfully urge that this Court affirm the decision of the United States Court of Appeals for the Seventh Circuit which, in agreement with the Board, concluded that the Petitioners' restriction on its members' right to resign their Union membership during a strike violates Section 8(b)(1)(A) of the National Labor Relations Act, *as amended*.[2]

INTEREST OF AMICI CURIAE

Safeway Stores, Incorporated is currently signatory to more than 100 collective bargaining agreements with various labor unions whose members are covered by those agreements. California Porsche-Audi; European Motors, Ltd.; San Francisco Auto Center; and Lucas Dealership Group are automobile dealerships located in the State of California, each of whom has collective bargaining relationships with several labor organizations covering each dealership's non-supervisory employees. Lynch Communications Systems, Inc. is an electronic manufacturing corporation whose employees are similarly represented by a labor organization.

Most of these collective bargaining agreements contain union security provisions, requiring the employees

[1] We hereby certify that we have obtained the consent of all the parties, including the Solicitor General of the United States on behalf of the Respondent National Labor Relations Board, to file this Amicus Curiae Brief in support of the position of Respondents herein. Copies of the consents executed by the respective parties are attached hereto as Appendices to this Brief, and are filed simultaneously with the filing of this brief with the Court.

[2] 61 Stat. 136, 73 Stat. 519, 29 U.S.C., Section 158(b)(1)(A), which is quoted in relevant part on page 2 of the Petitioners' Brief. Hereinafter, the National Labor Relations Act is referred to as "the Act"; the Pattern Makers' League of North America, AFL-CIO, and its Rockford and Beloit Associations are collectively referred to as "the Union" or "the Petitioners." References to the records, appendices, and other relevant documents will conform to those in the Petitioners' Brief.

involved to join the union and remain union members throughout the life of the contract. Some of the unions with whom these employers have such collective bargaining relationships also have constitutional provisions similar to that at issue herein, restricting members' rights to resign, specifically during strikes. Moreover, these employers have been, and may in the future be, faced with union sponsored strikes and work stoppages. During such strikes, these employers receive numerous inquiries from employees, faced with financial hardship, who desire to exercise their statutorily guaranteed right to refrain from concerted activity,[3] but who have expressed an inability to exercise their right due to fear of substantial union fines.

Accordingly, as a party to these numerous collective bargaining agreements, and faced with strikes in which their employees' right to return to work is endangered by coercive union fines, each *amicus curiae* has a strong interest in protecting its employees' Section 7 rights, as well as resolving the lawfulness of restrictions upon these rights.

SUMMARY OF ARGUMENT

Unfair labor practice charges were filed by the Association against the Union arising out of the Union's imposition of substantial fines upon eleven employees employed by various employer members of the Association. These employees had resigned from the

[3] This right is embodied in Section 7 of the Act, 29 U.S.C. Section 157, which states, in pertinent part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, *and shall also have the right to refrain from any or all such activities* . . .

(Emphasis added.)

Union during the course of a seven-month strike conducted by the Union during 1977, and had thereafter returned to work. At issue is the validity of a Bylaw enacted by the Union in 1976, known as "League Law 13," which purports to restrict the time during which a resignation may be submitted, as follows:

> No resignation or withdrawal from an Association, or from the League, shall be accepted during a strike or lockout, or at a time when a strike or lockout appears imminent.

(App. 28a n.3.)

It is the position of the *amici curiae* that the Labor Board and the Court of Appeals for the Seventh Circuit correctly concluded that "[t]he Section 7 right to refrain from union activities encompasses the right of members to resign from the union," and that "because League Law 13 completely suspends an employee's right to choose not to be a union member and thus no longer subject to union discipline, it frustrates the overriding policy of labor law that employees be free to choose whether to engage in concerted activities." (App. 5a-6a). Recognizing that unions have an interest in preserving strength during a strike, we nevertheless submit that such interest, which is neither embodied in the Act nor reflected in any of the extensive legislative history recited in the Petitioners' Brief, does not stand *in pari materia* with the *recognized, guaranteed statutory* right of the individual employee to refrain from participating in concerted activities. Accordingly, we urge that the interest of a union to adopt rules that are calculated to require that its employees-members stand "shoulder-to-shoulder" during a strike or a work stoppage must yield, when balanced against the statutory right of employees to refrain from union activities by resigning from union membership. Although we contend that such statutory right must always be found to override the unions' institutional self interests when the two

conflict, we note that such result is particularly warranted where, as here, employees sought to resign from union membership during the course of a protracted strike which had caused them substantial personal and financial hardship.

We show below, contrary to the contentions raised by the Petitioners in their brief, that the imposition of substantial fines upon employees who have attempted to resign their union membership in the midst of a protracted strike is clearly intended as a significant deterrent to the employees' attempt to resume employment contrary to the wishes of their Union. As such, these fines directly and proximately impinge upon the employment relationship so as to fall squarely outside the limited immunity afforded to labor organizations by the proviso to Section 8(b)(1)(A) of the Act, 29 U.S.C. Section 158(b)(1)(A), to "prescribe their own rules with respect to the acquisition or retention of membership therein."

Finally, we show that Petitioners' suggestion that employees are unconditionally bound by their unions' rules, including restrictions on their right to resign, is erroneously premised upon the notion that employees who become members of labor organizations do so freely and voluntarily, and that they are free to resign at times other than during periods of strikes or lockouts or when such activities are "imminent." Such a notion ignores the realities of the industrial workplace, which is that most employees — and certainly the employees involved in the case at bar — become and remain union members as the result of the explicit obligation contained in collectively bargained "union security" provisions, which require continuing union membership as a mandatory condition of their continued employment.

ARGUMENT

A. Restricting A Union Member's Right To Resign, And Enforcing That Restriction By Substantial Fines For Post-Resignation Conduct, Constitutes "Restraint And Coercion" Violative of Section 8(b)(1)(A) Of The Act.

In *N.L.R.B. v. Granite State Joint Board, Textile Workers Union of America, Local 1029, AFL-CIO*, 409 U.S. 213 (1972), and later in *Booster Lodge No. 405, International Association of Machinists v. N.L.R.B.*, 412 U.S. 84 (1973), this Court held that a union violated Section 8(b)(1)(A) of the Act when it fined an employee who resigned from the union and then returned to work during a strike. In both cases, the unions fined employees who, having first resigned their membership, then crossed the union picket lines in the midst of a lengthy and economically disastrous strike.

The unions had contended that this Court's earlier decisions in *N.L.R.B. v. Allis-Chalmers Manufacturing Co.*, 388 U.S. 175 (1967), and *Scofield v. N.L.R.B.*, 394 U.S. 423 (1969), privileged such actions, on the ground that these fines fell within the "ambit of the union's control over its internal affairs."[4] The Court in *Granite State* rejected this contention, concluding that:

> The *Scofield* case indicates that the power of the union over the member is certainly no greater than the union-member contract. Where a member lawfully resigns from a union and thereafter engages in conduct which the union rule proscribes, the union commits an unfair labor practice when it seeks enforcement of fines for that conduct. That is to say, when there is a lawful dissolution of a union-member relation, the union has no more control over the former member than it has over the man in the street.

409 U.S. at 217. Turning to the bitter realities recited in the facts of that case, the Court then noted that most of the affected employees who chose to resign their membership and work behind the union picket line did so after the seventh month of a strike which "was still in progress 18 months after its inception":

> Events occurring after the calling of a strike may have unsettling effects, leading a member who voted to strike to change his mind. The likely duration of the strike may increase the specter of hardship to his family; the ease with which the employer replaces the strikers may make the strike seem less provident. . . . [W]e conclude that the vitality of Section 7 requires that the member be free to refrain in November from the actions he endorsed in May and that his Section 7 rights are not lost by a union's plea for solidarity or by its pressures for conformity and submission to its regime.

409 U.S. at 217-18.

As a direct response to this Court's repeated refusal to permit unions to impose disciplinary sanctions upon

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[4] In *Allis-Chalmers*, this Court upheld the right of unions to punish *members* whom it found to have violated explicit union rules prohibiting, e.g., working behind a union-sanctioned picket line, which it considered an exercise of their recognized right to "protect against erosion of their status . . . through reasonable discipline of members who violate rules and regulations. . ." 388 U.S. at 181.

In *Scofield*, this Court noted that while "a union rule, duly adopted and not the arbitrary fiat of a union officer, forbidding the crossing of a picket line during a strike was therefore enforceable against *voluntary* union members by expulsion or a reasonable fine," 394 U.S. at 428 (emphasis added):

> If a member chooses not to engage in this concerted activity and is unable to prevail on the other members to change the rule, then he may leave the union . . .

394 U.S. at 435. Thus, as this Court further noted:

> Section 8(b)(1) leaves a union free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced against union members *who are free to leave the union and escape the rule*. This view of the statute must be applied here.

394 U.S. at 430 (emphasis added).

employees who, in the words of the *Scofield* Court, left their union in order to "escape the rule," many unions, including the Pattern Makers League, were quick to adopt constitutional or bylaw provisions that have the intention and effect of locking employees into their union membership during strikes or lockouts, or when such events appeared "imminent," without the opportunity freely to resign. However, the Board on at least three different occasions has rejected union attempts to accomplish, by the mere insertion of restrictive language regarding resignation, the indirect restriction of resignation rights which this Court would not permit directly in *Scofield* and *Granite State*.[5]

In the first such case, *Machinists Local 1327 (Dalmo-Victor)*, 231 NLRB 719 (1977), *rev'd and remanded* 608 F.2d 1219 (9th Cir. 1979), *on remand*, 263 NLRB 984 (1982), *enforcement denied*, 725 F.2d 1212 (9th Cir. 1984), *petition for cert. pending*, four of the five Board members concluded (Member Jenkins dissenting) that an amendment promulgated by the International Association of Machinists in its constitution as a response to this Court's *Granite State* decision[6] constituted a violation of Section

[5] In a concurring opinion in *Granite State*, 409 U.S. at 218, Chief Justice Burger made the following pertinent observations:

> The balance is close and difficult; unions have need for solidarity and at no time is that need more pressing than under the stress of economic conflict. Yet we have given special protection to the associational rights of individuals in a variety of contexts; through Section 7 of the Labor Act, Congress has manifested concern with those rights in the specific context of our national scheme of collective bargaining. *Where the individual employee has freely chosen to exercise his legal right to abandon the privileges of union membership, it is not for us to impose the obligations of continued membership.*

(Emphasis added.)

[6] The amendment provided, in pertinent part, that "resignation would not relieve a member of his obligation to refrain from accepting employment . . . in an establishment where a strike or lockout exists . . . for the duration of the strike or lockout or within 14 days preceding its commencement."

8(b)(1)(A) of the Act.[7] In so ruling, Board Members Fanning and Zimmerman reasoned that:

> [T]he Supreme Court's remarks in *Granite State*, read in conjunction with the *Scofield* requirement that union members must be free to leave the union and escape the rule, lead inescapably to the conclusion that a member's right to resign from a union applies both to strike and nonstrike situations. We hold today that a union rule which limits the right of a union member to resign only to nonstrike periods constitutes an unreasonable restriction on a member's Section 7 right to resign.

263 NLRB at 986.

Then-Chairman Van de Water and Member Hunter, in a lengthy concurring opinion in *Dalmo-Victor*, offered the following further analysis which led them to conclude that any restriction imposed upon a union member's right to resign was unreasonable and thus violative of Section 8(b)(1)(A):

> [O]nce an employee becomes a union member, he cannot be bound forever to the rules and coercive force of the union, but must be allowed to change his mind based upon subsequent developments. . . .
>
> * * * * * *

[7] Two of the four majority Members (former Member Fanning and Member Zimmerman) had concluded that "the right of union members to resign is not absolute," and, in the interest of protecting the union's "right" to maintain its strike objectives they created a rule permitting unions to restrict resignations for up to 30 days. 263 NLRB at 987. Member Hunter and former Chairman Van de Water, however, would have found illegal *any* restriction on a union member's right to resign. 263 NLRB at 992-93.

All four Board Members, however, agreed in *Dalmo-Victor* that the restriction upon resignation contained in the Machinists Union's Constitution clearly violated Section 8(b)(1)(A) of the Act.

> Surely a union is vested with sufficient lawful means of persuasion and peer pressure to preserve strike solidarity without requiring suspension of the Act's fundamental protections. In fact, if a union is unable to preserve strike solidarity through less restrictive means than sanctions that override the Act's protections, perhaps it should reconsider its decision to strike in the first place.

263 NLRB at 990, 991 n.47.[8]

Finally, the concurring Board Members rejected the union's contention that the institutional interests of the union in preserving "strike solidarity" stood on equal footing with the statutory right of individual member-employees to refrain from continuing their support for their union or its strike:

> [T]he substantial diminution of express statutory rights is warranted only when the statutory right collides with a corresponding *right* of relatively

[8] In an insightful commentary written shortly after the Board issued its first ruling in *Dalmo-Victor*, Professor Harry H. Wellington expressed similar doubts as to the need for unions to enforce "strike solidarity" by forcing employees to remain members and punishing those employees who, trapped into continued membership against their will, nevertheless seek to alleviate their financial and personal hardship by resuming employment in the midst of a lengthy strike:

> It is difficult to believe that union leaders are so far removed from their rank and file that they cannot predict how many deserters they will encounter during a strike. To the extent that union officials do have honest doubts about their capacity to wage protracted economic war (a source of concern if one accepts the underlying rationale of *Allis-Chalmers* [*supra*]), they could poll their membership in a secret ballot. Moreover, unions are meant to be democratic institutions. If unfettered freedom to resign so depletes a union's ranks over time that the strength of its strike is sapped, one is tempted to say that the members have spoken, the consensus has evaporated, and the strike should come to an end.

Wellington, *Union Fines and Workers' Rights*, 85 YALE L.J. 1022, 1044-45 (1976) (footnote omitted).

> equal import and legal significance. We contend most strongly that the express Section 7 rights of employees are surely more than mere "interests" subject to limitation because their operation somehow impinges upon the institutional desires of a union. Conversely, a union's institutional *interests*, to our knowledge, have never been elevated to the point where they stand on equal footing with, and, indeed, override and negate the fundamental protections of Section 7. . . .

263 NLRB at 990-91 (emphasis in original; footnote omitted).

Scarcely three months after it issued its decision in *Dalmo-Victor*, a unanimous Board, this time consisting of Chairman Van de Water and Members Fanning, Hunter and Zimmerman, concluded in the case at bar that League Law 13, which attempted to restrict resignation of the League's members during periods of strikes, lockouts, or when such events appeared "imminent," contravened Section 8(b)(1)(A) of the Act. The Court of Appeals for the Seventh Circuit affirmed the Board's decision (App. 1a-8a) and granted enforcement of its remedial order requiring the Union to "[c]ease and desist from giving force and effect to League Law 13" and "imposing fines and other penalties upon former members for conduct in which they engaged after their effective resignation from [the Union]." (App. 17a.)

Finally, in June 1984, the Board for a third time struck down, as violative of Section 8(b)(1)(A), a union's attempt to restrict its members' right to resign during a strike in order to return to work without fear of monetary sanctions. In *International Association of Machinists and Aerospace Workers, Local Lodge 1414 (Neufeld Porsche-Audi, Inc.)*, 270 NLRB No. 209, 116 LRRM 1257 (1984), a Board majority consisting of Chairman Dotson and Members Hunter and Dennis reaffirmed the Board's earlier rulings on the issue, determining that:

> [W]hen a union seeks to delay or otherwise impede a member's resignation, it directly impairs the employee's Section 7 right to resign or otherwise refrain from union or other concerted activities. In addition, by creating the fiction of continued membership, restrictions on resignations undermine the policies of Section 8(b)(2)[9] and the second proviso to Section 8(a)(3)[10] that serve to prohibit a union from compelling full membership.
>
> Similarly, restrictions on resignation also impair the fundamental policy repeatedly recognized by the Supreme Court to be imbedded in the very fabric of the labor laws that distinguishes between internal union actions and external union actions. . . . By unilaterally extending an employee's membership obligation through restrictions on resignation a union artificially expands the definition of internal action and can thus

[9] Section 8(b)(2) of the Act, 29 U.S.C. Section 158(b)(2), makes it an unfair labor practice for a union:

> to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

Notably, in the instant case, the Board's finding that the Union violated this section of the Act by refusing to readmit one of the employees who returned to work during the strike and by thereafter urging his employer to discharge him in accordance with the union security provisions contained in the parties' collective bargaining agreement (App. 15a-16a) has not been contested by the Union, either in the Circuit Court of Appeals or before this Court.

[10] The second proviso to Section 8(a)(3) of the Act, 29 U.S.C. Section 158(a)(3), states, in relevant part:

> That no employer shall justify any discrimination against an employee for non-membership in a labor organization . . . (B) if he has reasonable grounds for believing that such membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

> continue to regula nduct over which it would otherwise have no control. We find no basis in the Act for allowing unions to alter unilaterally the statutory structure so carefully elucidated by the Supreme Court.

116 LRRM at 1260 (footnote omitted).

In sum, over the past two years, three separate Board panels comprising a total of six (6) different Members whose views reflect the entire political spectrum from liberal to conservative,[11] have unequivocally rejected, as unlawful, attempts by labor unions to restrict the rights of their members freely to resign from membership. They have so ruled even where the resignations have occurred during periods such as strikes or lockouts when, admittedly, the institutional need of those organizations for "solidarity" is paramount.

It is disingenuous, we submit, for the Union to rely upon the aberrational decision of the Ninth Circuit in the second *Dalmo-Victor* case (*Machinists Local 1327 v. N.L.R.B.*, 725 F.2d 1212 (1984)), for the proposition that League Law 13 falls comfortably within the protection of the proviso to Section 8(b(1)(A), which "reserves to unions the power to make reasonable rules regarding the retention and acquisition of membership," and that, accordingly, fines against employees for accepting post-

[11] Former Member Fanning, a Democrat who ruled to strike down the Machinists Union's restrictive provisions regarding resignation during strikes in the *Dalmo-Victor* case, and who also concurred with the Board majority in the instant case, was appointed to his last term by former President Carter. Member Zimmerman, an Independent who joined Member Fanning in the majority decision in *Dalmo-Victor*, as well as the majority opinion in the case at bar, was likewise appointed by President Carter. Former Chairman Van de Water and Member Hunter, who wrote concurring opinions in *Dalmo-Victor*, as well as the opinion in the case at bar, are Republicans who were appointed by President Reagan. Current Board Chairman Dotson, a Republican, and Member Dennis, a Democrat, both of whom joined the majority opinion in *Neufeld Porsche-Audi, supra*, were also appointed by President Reagan.

resignation employment with the struck employer do not constitute "coercion" within the contemplation of the Act (Petitioners' Brief, p. 8, *quoting* 725 F.2d at 1216). Rather, as the Court observed in *N.L.R.B. v. The Boeing Company*, 412 U.S. 67 (1973), contrary to the Union's contention herein, "all fines are coercive to a greater or lesser degree." 412 U.S. at 73. Thus, resolution of the issue herein centers not upon whether these particular fines might be deemed "coercive" but, rather, on whether union imposition of such fines could necessarily be said to impinge upon the employment relationship. Thus, the *Boeing* Court held that:

> The underlying basis for the holdings of *Allis-Chalmers* and *Scofield* [*supra*] was not that reasonable fines were non-coercive under the language of Section 8(b)(1)(A) of the Act, but was instead that those provisions were not intended by Congress to apply to the imposition by the union of fines not affecting the employer-employee relationship and not otherwise prohibited by the Act. . . .
>
> * * * * * *
>
> At least since 1954, it has been the Board's consistent position that it has "not been empowered by Congress . . . to pass judgment on the penalties a union may impose on a member so long as the penalty does not impair the member's status as an employee." . . .

412 U.S. 73, 74-5 (footnotes and citations omitted).

We can imagine no greater imposition upon a member's status as an employee, nor a greater effect upon the employer-employee relationship as envisioned by this Court in *Boeing*, *Scofield*, *Granite State*, and their progeny, than a union rule that purports to restrict a member's right to resign, thereby subjecting that member to substantial fines should he exercise his right to abandon a strike in order to return to work to feed his

family. Indeed, in this very case, the Board's Administrative Law Judge found that one of the affected employees was fined "$4,200 for damages due injury the Beloit Association for deserting the strike by returning to work" (App. 29a), while the other ten (10) individuals who attempted to resign their membership in order to return to work were fined in an amount "approximately commensurate with their earnings . . . for returning to work during the strike." (App. 28a.) If the cost of returning to work is most, all of, or even more than, the amount the employee stands to earn by doing so, no employee can safely accept employment for the duration of any strike, no matter how long the strike lasts and without regard to the economic hardships imposed upon him and his family or the imminence of his being permanently replaced by his employer. *See N.L.R.B. v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938); *Belknap, Inc. v. Hale*, ___ U.S. ___, 103 S. Ct. 3172, 3177 (1983).

Surely, there are far less coercive means of enforcing a union's legitimate objective of group solidarity[12] during a strike than by depriving an employee of his livelihood through the use of fines equal to or greater than his strike-period earnings. Aside from the not inconsiderable peer pressure placed upon the employee by his fellow workers, such less coercive means include suspension or even expulsion from the union. While Section 8(a)(3) of the Act[13] protects an employee from losing his job as a result

[12] While we agree that the desire to stand "shoulder-to-shoulder" during a strike is an important union interest, this interest is significantly diminished in the circumstances of the so-called "sympathy" strike. In such situations, an employee may be forced to remain out of work during the life of a collective bargaining agreement, which is intended to protect him from strikes or lockout, due to a dispute which has nothing whatsoever to do with his employment. *See Buffalo Forge Co. v. United Steeworkers of America, AFL-CIO*, 428 U.S. 397 (1976).

[13] 29 U.S.C. Section 158(a)(3). *See* footnote 10, *supra*, for the text of its relevant proviso regarding discrimination by employers against employees for "non-membership in a labor organization."

of such union action,[14] nevertheless there are both tangible and intangible losses associated with loss of union membership which a union member must weigh before determining whether mid-strike resignation is appropriate. Those losses may include, *inter alia*, the loss

[14] Under the Supreme Court's decision in *N.L.R.B. v. General Motors Corp.*, 373 U.S. 734, 742 (1963), "'membership' as a condition of employment has been whittled down to its financial core." As this Court further observed:

> It is permissible to condition employment upon membership, but membership, insofar as it has significance to employment rights, may in turn be conditioned only upon payment of fees and dues. . . .

Id. In his excellent article on the subject, Professor Wellington refers to *Radio Officers' Union v. N.L.R.B.*, 347 U.S. 17 (1954), where the Court noted that except for the payment of union dues and fees provided for under a valid union security agreement, "No other discrimination aimed at encouraging employees to join, retain membership, or stay in good standing in a union is condoned. [347 U.S. at 41-2.]" *Wellington, supra,* at 1050. He then goes on to note that:

> [A]s a matter of federal labor policy, the conclusion that a worker may not be discharged for resigning is consistent with the overriding intent of both Section 8(a)(3) and Section 8(b)(1)(A) to separate employment rights from union rights. Just as union discipline cannot be enforced by either actual or threatened job discrimination, it seems clear that no union security clause, however broad, can justify discharge of a former member who has resigned to escape union discipline, so long as he meets his minimal financial obligations.

Id. at 1050-51 (footnotes omitted).

Unfortunately, as we discuss more fully at pages 19-22, *infra*, most union members are not sufficiently familiar with this rather sophisticated concept of labor law to understand or appreciate their legally recognized right to resign their union membership while still continuing to pay periodic dues in accordance with the union security clause of their employer's collective bargaining agreement. *See N.L.R.B. v. Hershey Foods Corp.*, 513 F.2d 1083 (9th Cir. 1975); Ogden, *Dalmo-Victor: A Troubled Sleep Deserves a Hershey Kiss*, 35 LABOR L.J. 374 (1984).

of union benefits,[15] including pensions, insurance, strike benefits, medical facilities, recreation centers, and dependents' scholarships, as well as the right to attend union meetings and social functions or to be heard within the union's councils, the right to hold union office, and the opportunity to participate in the formulation of bargaining proposals and to vote for or against a proposed contract once it has been agreed upon at the bargaining table. *General Motors*, 373 U.S. at 737.[16]

Discouraging employees from accepting employment by means of disciplinary fines is no less coercive than a union's overt attempt to force an employee to forego his right to refrain from supporting its strike by threats and intimidation.[17] *General Motors, supra; Hershey Foods, supra*. Both forms of conduct, we submit, are unlawful, and cannot be condoned by this Court.

[15] Such benefits would not, of course, include any that are provided pursuant to a collective bargaining agreement between the union and the employee's employer.

[16] For a more detailed discussion of the effects of resignation upon the employee-member, see Wellington, *supra*, at 1045-48.

[17] Indeed, as recently as November 7, 1984, a unanimous Board panel consisting of Chairman Dotson and Members Zimmerman and Dennis determined, contrary to the agency's administrative law judge, that a union which sought to impose a reinitiation fee upon two members who had previously resigned their membership but sought to rejoin in order to comply with the terms of their employer's union security agreement with the union, did so in derogation of the employees' Section 7 "right to refrain from joining unions as full members and to meet only their financial core obligations." The Board, therefore, concluded that "the imposition of the additional initiation fees on the Charging Parties acted as a penalty for the exercise of their Section 7 rights." *Professional Engineers Local 151 (General Dynamics Corp.)*, 272 NLRB No. 164, 117 LRRM 1443, 1444 (1984).

B. THE PETITIONERS' CONTENTION THAT MEMBERSHIP IN LABOR UNIONS IS ENTERED INTO FREELY AND VOLUNTARILY IS MISLEADING AND ERRONEOUS.

The Petitioners rely heavily upon the notion (*see* Petitioners' Brief, pp. 34-38) that the Union's constitutional restriction against resignation is further justified by common law concepts concerning the right of voluntary associations to restrict the conditions under which their members may resign their membership. To support this contention, the Petitioners recite a line of cases in which various courts have determined that voluntary associations such as country clubs, medical societies, and automobile dealership advertising consortia were free to promulgate rules restricting the manner and method in which members could tender their resignation from those associations. The common thread in those cases, however, is that the persons who sought to resign their membership from the particular organization *"voluntarily* submitted to the rule of the . . . majority." *Leon v. Chrysler Motors Corporation,* 358 F. Supp. 877, 885 (D.N.J. 1973) (emphasis added).[18]

Clearly, the linchpin of each of these cases and, indeed, of the Petitioners' argument regarding the applicability of the common law of voluntary associations, is the *freedom*

[18] Indeed, there is serious doubt as to the efficacy of associational restrictions upon its members' right to resign, even assuming, *arguendo,* that its members do, in fact, freely and voluntarily enter the association. According to one leading treatise referred to by the Petitioners in their Brief (at p. 36):

> A member may lawfully resign at any time from an association or club and terminate his liability for dues and fees, upon payment of all accrued charges, *and a bylaw which restricts this right or makes the withdrawal subject to the organization's approval is invalid.* . . .

6 AM. JUR. 2D Associations and Clubs, Section 26 (1963), *citing Haynes v. Annandale Golf Club,* 110 Cal. App. Supp. 765, 289 P. 806 (1930) (emphasis added).

and *voluntariness* with which members joined their respective associations. Thus, Petitioners argue:

> Each member joined the Unions, or retained his membership *when free to resign,* with the understanding that he was *agreeing* not to resign during a strike or when a strike appeared imminent, and with the further understanding that other members were *agreeing* to be similarly bound.
>
> * * * * * *
>
> While *no employee in the bargaining unit is required to join the union in the first place,* once he joins and begins receiving the benefits of union membership, the fundamental law of associations dictates that he may be bound by a union resignation rule of the kind at issue here, *to which he agreed* . . . requiring him to continue his membership . . .

(Petitioners' Brief, p. 38; emphasis added.)

The underscored language recited above reflects the Petitioners' misleading and erroneous premise that, like members of a golf club or medical society, union members acquire their membership *voluntarily,* and that they are free to leave at times other then periods of strikes, lockouts, or when such events are "imminent." As we show below, this premise is clearly invalid.

According to a recent comprehensive survey conducted by the Bureau of National Affairs of over 400 collective bargaining agreements from across the U.S. covering bargaining units which include 50 or more employees, some 73 percent of those contracts contained either union shop or modified union shop provisions *requiring employees to become and remain members of a labor union as a condition of their continued employment.*[19] To the average

[19] Bureau of National Affairs, *Collective Bargaining Negotiations and Contracts,* vol. 2 pp. 87:1-87:4 (1983).

worker covered by such provisions, which are contained in a collective bargaining agreement dictating the terms and conditions of his employment, mandatory membership requires not simply that the employee pay an initiation fee and periodic monthly dues, but that he join the union, thereby assuming whatever might be the duties and obligations of union membership, as well.

Most contractual union security agreements, including the provisions contained in collective bargaining agreements between the League and the Union in the case at bar, are silent with respect to the rights of members to resign from full membership, retaining only their "financial core" obligations to pay periodic dues and initiation fees. Indeed, the only class of union security provision that affirmatively notifies the worker of his limited financial obligation is the "agency shop" clause, under which employees are not required to join the union, but merely to pay a service charge equal to or less than union dues. However, the "agency shop" clause, according to the above-referenced survey of nationwide collective bargaining agreements, appears in only five percent of the contracts surveyed.[20]

As Professor Wellington has observed:

> [M]ost union security clauses fail to inform the worker that his statutory obligation is limited to payment of dues. This failure is hardly surprising. . . . There is little reason to believe that the average worker, confronted with an over-inclusive union security clause, a silent union constitution, and ambiguous Supreme Court statements will have the faintest glimmer of his right to immunize himself from union discipline. Today, as in 1967 when Mr. Justice Black first noted the problems inherent in the "full membership" concept "[f]ew employees forced to become 'members' of the union by virtue of the union security clause will be aware

[20] *Id.* at 87:2.

> of the fact that they must somehow 'limit' their membership to avoid the union's court-enforced fines." . . .[21]

Simply put, the average worker cannot be expected to discern the difference between "financial core membership" — that is, an employee's right, recognized in Section 8(a)(3) of the Act, to whittle down his obligation to his union under the governing collective bargaining agreement to simply paying periodic dues and initiation fees — and "full-fledged" membership, which includes the obligation to submit to the full panoply of union rules and regulations, from which he might indeed escape during the life of his employer's labor contract. As this case demonstrates, there is absolutely no evidence that the Union informed those members who later sought to resign that they were free to resign their full-fledged membership at any time prior to the imminence of a strike or lockout, as Petitioners here suggest. (Petitioners' Brief, p. 38.)

So long as unions do not affirmatively disclose to newly hired employees of unionized establishments — by a specific constitutional provision, by less all-encompassing union security agreements, or by clear and unambiguous written notification at the time the union membership requirement is imposed — that they are free to resign their membership at any time before a strike or lockout appears "imminent," employees who undertake employment for an employer whose collective bargaining agreement contains a traditional union shop provision cannot be expected to know and appreciate any so-called "freedom to resign." To the contrary, prior decisions of this Court

[21] Wellington, *supra*, at 1051-52, citing and quoting from *Allis-Chalmers*, 388 U.S. at 215 (Black, J., dissenting). *See also Evans v. American Federation of Television & Radio Artists*, 354 F. Supp. 823 (S.D.N.Y. 1973), *rev'd and remanded sub nom. Buckley v. American Federation of Television & Radio Artists*, 496 F.2d 305 (2d Cir.), *cert. denied*, 419 U.S. 1093 (1974).

have tended to obscure, rather than to emphasize, the financial core obligations so fervently espoused by the Petitioners in their Brief. Thus, this Court has suggested that even those employees who join labor unions and retain their membership in those organizations solely under the assumption that such membership is a condition of their continued employment, are *presumed* to have undertaken full-fledged membership, absent clear evidence to the contrary. *Allis-Chalmers*, 388 U.S. at 196-97, *citing International Association of Machinists v. Street*, 367 U.S. 740, 774 (1961).

It is sheer sophistry for the Petitioners to suggest that their members joined "freely and voluntarily" and thereby agreed to be bound by Union rules and regulations. To the contrary, the typical employee's initial decision is not to join or not join the union, but rather is to accept or not accept a job with a unionized employer, governed by a union security provision. Accordingly, in most cases, an employee-member has *not* voluntarily chosen to join the union, but instead has voluntarily chosen to work for an employer, and joins the union merely as an imposed condition of that employment. Petitioners' reliance upon cases purporting to construe the "common law of voluntary associations" is, therefore, utterly misplaced and should be rejected by this Court.

CONCLUSION

For the foregoing reasons, Safeway Stores, Incorporated; California Porsche-Audi; San Francisco Auto Center; European Motors, Ltd.; Lucas Dealership Group; and Lynch Communications Systems, Inc. urge the Court to affirm the decision of the Court of Appeals upholding the Board's finding that the enforcement of League Law 13 against employee-members who attempt to resign their union membership during the course of a strike constitutes conduct violative of Section 8(b)(1)(A) of the Act.

Respectfully submitted,

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December 1984

APPENDIX

APPENDIX 1

AMERICAN FEDERATION OF LABOR AND CONGRESS
OF INDUSTRIAL ORGANIZATIONS

(Logo)

815 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 637-5000

November 19, 1984

Carol R. Caine, Esq.
Littler, Mendelson, Fastiff & Tichy
650 California Street, 20th Floor
San Francisco, CA 94109-2693

Re: *Pattern Makers, et al v. NLRB, et al.*, No. 83-1894

Dear Ms. Caine:

On behalf of the petitioners in the above-noted case, I hereby consent to your request to file a brief *amicus curiae* in support of the position of the respondents; my consent is premised on the understanding that the brief will be filed on or before the due date for respondents' brief.

Sincerely,

LAURENCE GOLD,
Counsel of Record.

FAHY & CHENEY, LTD.
Attorneys at Law
Suite 202
303 North Main Street
Rockford, Ilinois 61101

NOV 26 1984
(Stamped Date)

November 19, 1984

Wesley J. Fastiff, Esq.
Littler, Mendelson, Fastiff & Ticky
Attorneys at Law
20th Floor
650 California Street
San Francisco, California 94108

Re: *Pattern Makers' League of North America, AFL-CIO, et al. v. National Labor Relations Board and Rockford-Beloit Pattern Jobbers Association,* No. 83-1894

Dear Mr. Fastiff:

In response to your telephone request, Respondent, Rockford-Beloit Pattern Jobbers Association consents to your filing an *amicus curiae* brief in the above-captioned case on behalf of Safeway Stores, Inc., European Motors, California Porsche-Audi Lincoln-Mercury, San Francisco, California, Auto Center, Lucas Dealership Group and Lynch Communications Co., Inc. and supporting the position of Respondents.

Very truly yours,

FAHY & CHENEY, LTD.,
EDWARD J. FAHY,
Attorney for Rockford-Beloit
Pattern Jobbers Association.

EJF:lkj

cc: Lawrence Gold, Esq.
Rex E. Lee Esq.
Wilford W. Johansen, Esq.
Norton J. Come, Esq.

(Logo)

U.S. DEPARTMENT OF JUSTICE
Office of the Solicitor General
Washington, D.C. 20530

November 20, 1984

Carol R. Caine, Esq.
Littler, Mendelson, Fastiff & Tichy
650 California Street, 20th Floor
San Francisco, California 94108-2693

Re: *Pattern Makers' League of North America, et al. v. National Labor Relations Board, et al.,* No. 83-1894

Dear Ms. Caine:

As requested in your letter of November 13, 1984, I hereby consent to the filing of a brief *amicus curiae* on behalf of Lucas Dealership Group and Lynch Communications Systems, Inc. (Nev.).

Sincerely,

REX E. LEE,
Solicitor General.

APPENDIX 4

U.S. DEPARTMENT OF JUSTICE
(Logo) Office of the Solicitor General
Washington, D.C. 20530

November 6, 1984

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650 California Street, 20th Floor
San Francisco, California 94108-2693

Re: *Pattern Makers' League of North America, et al. v. National Labor Relations Board, et al.*, No. 83-1894

Dear Ms. Caine:

As requested in your letter of October 30, 1984, I hereby consent to the filing of a brief *amicus curiae* on behalf of Safeway Stores, Incorporated, California Porsche-Audi, San Francisco Auto Center and European Motors, Ltd.

Sincerely,

REX E. LEE,
Solicitor General.

No. 83-1894

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PATTERN MAKERS' LEAGUE OF NORTH AMERICA, AFL-CIO, and ITS ROCKFORD and BELOIT ASSOCIATIONS

v.

NATIONAL LABOR RELATIONS BOARD

and

ROCKFORD-BELOIT PATTERN JOBBERS ASSOCIATION

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Does the establishment of a *de facto* closed shop through the dual effect of the union's failure to notify new employees of their right not to become full union members and the anti-resignation rule violate the labor law policy against closed shops, as well as frustrating the labor law policy protecting the employee's right to refrain from concerted activities?

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE AMICUS

This case presents the question of whether a union may lawfully enforce a rule prohibiting a union member from resigning his membership in anticipation of or during a strike. The National Labor Relations Board

("Board") held that such a rule improperly burdens the employee's right to refrain from concerted activities, a right protected by Section 7 of the National Labor Relations Act ("Act"), 29 U.S.C. § 157 (1982). The Board accordingly found the petitioners here guilty of an unfair labor practice for imposing court-collectible fines on employees who sought to resign their membership and return to work during a strike. The United States Court of Appeals for the Seventh Circuit enforced the decision, while the United States Court of Appeals for the Ninth Circuit denied enforcement in a case presenting a similar issue.

The Chamber of Commerce of the United States urges the Court to affirm the position of the Seventh Circuit and the Board.[1] The Chamber of Commerce is the largest business and professional organization in the United States. Its membership includes more than 4,000 state and local chambers of commerce and trade and professional organizations as well as 180,000 business firms and individual direct members. Many of its members are signatories to collective bargaining agreements with unions that have limitations on resignations similar to the one at issue here. The Chamber of Commerce thus has a significant interest in urging the vindication of the right of its members' employees to have freedom of choice with respect to supporting their union or their employer during a strike.

SUMMARY OF ARGUMENT

League Law 13 purports to restrict an employee's right to resign from the Union during a strike or lockout or when a strike or lockout appears imminent. The rule improperly burdens the employee's Section 7 right to refrain from concerted activities, and the Chamber of

[1] The parties to this case have provided their written consent to the filing of this brief. The letters granting consent have been filed with the Clerk.

Commerce urges affirmance for the reasons stated by the Court below and by the Board.

The Chamber also urges affirmance of the result below because of an additional labor law policy that is impaired in the circumstances of this case: the policy against closed shops. The Union failed to disclose to new employees that they were not required to become full members of the Union. The members' joining of the Union therefore was not a voluntary act. League Law 13 compels continued subjection to the Union by precluding resignations at or after the expiration of the collective bargaining agreement. The members had no meaningful choice as to joining the Union and no meaningful choice as to leaving the Union, thus creating a *de facto* closed shop.[2]

The Taft-Hartley Act squarely prohibits closed shops, and the legislative history confirms the congressional determination that the closed shop was an evil to be eliminated. Nothing in the legislative history supports the view that a union can evade the prohibition through an anti-resignation rule in conjunction with the union's failure to notify the employees in the first instance of their right not to join. League Law 13 thus "invades or frustrates an overriding policy of the labor laws," and the rule therefore may not be lawfully enforced. *Scofield v. NLRB*, 394 U.S. 423, 429 (1969).

[2] A "closed shop" is an arrangement banned by the Taft-Hartley Act whereby an individual is required to become a full union member as a condition of obtaining and maintaining employment. The Union here creates a *de facto* closed shop by making it a practical impossibility for an employee to have his job without being a full union member.

ARGUMENT

I. LEAGUE LAW 13, IN CONJUNCTION WITH THE UNION'S ADMINISTRATION OF ITS UNION-SECURITY CLAUSE, VIOLATES THE LABOR POLICY AGAINST CLOSED SHOPS AND THEREFORE CANNOT VALIDLY BE APPLIED.

The Court provided the analysis for assessing the validity of a union rule in *Scofield v. NLRB*, 394 U.S. 423, 430 (1969): "[A] union [is] free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced against union members who are free to leave the union and escape the rule." League Law 13 prevents a member from withdrawing from the Union during a strike or lockout or when a strike or lockout "appears imminent." Appendix 2a (hereinafter "App."). As found by the Board below and affirmed by the Seventh Circuit, the rule impairs the congressional policy establishing the right of an employee to refrain from concerted activities and therefore cannot lawfully be enforced. App. 12a, 4a-6a. The Chamber of Commerce supports the analysis of the Board and the Seventh Circuit and therefore urges affirmance for the reasons stated in the Board and the lower court's opinions.

The *Scofield* test is a balancing test. *See* App. 6a-7a. It is thus appropriate to consider in the balance a related congressional policy that is implicated in the circumstances of this case: the policy against the closed shop. The record in this case demonstrates that employees are not advised of their rights and are not given a meaningful choice as to whether to become full members of the Union subject to Union discipline. The employees are compelled involuntarily to join the Union, and League Law 13 ensures that the employees cannot voluntarily leave the Union. The Union thus achieves a

functional closed shop, in contravention of the congressional policy imbedded in the Taft-Hartley Act against such compulsory unionization. League Law 13 does not reflect a legitimate union interest and impairs the congressional policy against closed shops, providing an independent ground in further support of the result reached by the court below.

The closed shop was a particular evil that the Taft-Hartley Act was enacted to prevent. Sections 8(b)(1), 8(b)(2), 8(a)(1), 8(a)(2), and 8(a)(3)[3] "form a web . . . preventing the union from inducing the employer to use the emoluments of the job to enforce the union's rules." *Scofield*, 394 U.S. at 429. For that reason, where a valid union-security clause exists, involuntary "membership" is restricted to the "financial core" of the payment of fees and dues, *NLRB v. General Motors Corp.*, 373 U.S. 734, 743 (1963), and a union may not impose judicially enforceable penalties on an employee who is not a full member, *see NLRB v. Allis-Chalmers Manufacturing Co.*, 388 U.S. 175, 196-97 & n.37 (1967). *See also United Stanford Employees*, 232 NLRB 326 (1977) (union notification to new employees that they were required to become full members constitutes unfair labor practice).

The collective bargaining agreements involved in this case had a union-security clause. *See* App. 11a, 14a & n.8, 16a n.13. Although the specifics of the clause are not stated, the record demonstrates that the union did not advise employees of their right to limit their participation to the financial core and told employees they had to become full members of the union to maintain their jobs. The Board found that the Beloit Association "improperly equated continued employment under [the union-

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[3] 29 U.S.C.§§ 158(b)(1)-158(b)(2), 158(a)(1)-158(a)(3) (1982).

security] agreement with the obtainment of full membership in its organization." App. 16a n.13.

Thus, for example, when employee John Nelson first began working for Atlas in March 1977 prior to the strike, the Shop Captain instructed him "to join the Union" by filing a membership application and taking the "oath of obligation." Testimony of Don Hansen, Hearing Transcript at 68, 44.[4] When Nelson subsequently tendered his dues in January 1977, the Union returned his check stating: "Since you are not a member of this Association [the Union] can not accept any payment from you for dues you don't owe." App. 29a.[5] Other communications between the Union and employees similarly display a failure by the Union to disclose the employee's right to avoid full Union membership. *See, e.g.*, App. 16a, 29a-30a.

The petitioners rely on the members' "Oath . . . obligating them to adhere to the Union's 'Constitution, Laws, Rules and Decision,'" Pet. Brief 3, as demonstrating a voluntary acceptance of the limitation on resignation. *See* Pet. Brief 13. The oath can have no meaning, however, where the employee was not informed that he did not have to take the oath. Similarly, the petitioner's reliance on "the common law doctrine on withdrawal from *voluntary* association," Pet. Brief 35 (emphasis added), is inapposite since the joining of the Union here fundamentally was involuntary.

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[4] It is the Chamber's understanding that the Board has lodged with the Clerk of the Court the full record of the proceedings, permitting references to the testimony before the Administrative Law Judge.

[5] The Board determined that the Union's failure to apprise the employees of their financial obligations and subsequent attempt to have them discharged for failure to meet those obligations constituted a separate violation in addition to the unfair labor practice arising out of its enforcement of League Law 13. *See* App. 14a-16a; pp. 7-8 *infra*.

Having thus compelled employees to become full members, the Union then sought to lock the employees in through League Law 13. The practical effect of and clear intent behind League Law 13 is to prevent any meaningful opportunity for an employee to leave the Union. He cannot resign prior to the expiration of the collective bargaining agreement while a new contract is being negotiated, because at that point a strike arguably "appears imminent." *See* App. 34a n.12. ("the language precluding resignations when a strike 'appears imminent' is so vague and susceptible to such varying interpretations as to severely limit the statutory right of members to resign even prior to a strike vote and possibly even prior to the commencement of negotiations") (ALJ Opinion). He cannot resign after the collective bargaining agreement expires, because at that point a strike is actually in effect. With the onset of a new contract with the same union-security clause, he will be subject to the same union compulsion to remain a full member that led to his initial membership.

Thus, League Law 13 in conjunction with the Union's failure to disclose the employee's right to refrain from full membership precludes any meaningful choice concerning the employee's subjection to Union discipline. The employee involuntarily joins the Union and involuntarily must remain in the Union.

The dual effect of League Law 13 and the Union's nondisclosure policy is similar to the situation where a union does not notify an employee of his obligation to remit dues and fees and then compels the employer to discharge the employee for failure to tender the payments. The Board and the courts have held that a union has a fiduciary duty to disclose a member's obligation to remit dues and fees and that breach of this duty precludes the union from seeking the discharge of an employee for his failure to meet the financial obligation. The Board has long held that a union has an "*affirmative* duty under the

Act specifically to inform an individual of his obligations and afford him a reasonable opportunity to satisfy them before seeking his discharge under a union-security clause." *Chauffeurs, Salesdrivers, & Helpers Union, Local 572, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers (Ralphs Grocery Co.)*, 247 NLRB 934, 935 (1980) (emphasis in original). *Accord, Teamsters Local 122 (August A. Busch & Co.)*, 203 NLRB 1041 (1973), *enforced*, 502 F.2d 1160 (1st Cir. 1974); *Philadelphia Sheraton Corp.*, 136 NLRB 888 (1962), *enforced*, 320 F.2d 254 (3d Cir. 1963). *See* App. 15a-16a, n.5 *supra*. The Courts have confirmed the Board's policy. *See, e.g., General Teamsters Local 162 v. NLRB*, 568 F.2d 665, 668 (9th Cir. 1978); *NLRB v. Local 182, International Brotherhood of Teamsters*, 401 F.2d 509 (2d Cir. 1968), *cert. denied*, 394 U.S. 213 (1969).

By the same token, the Union cannot have it both ways here. It cannot compel Union membership by failing to inform employees of their right not to be full members and then apply a restriction on their resignation. The result as a practical matter is a closed shop, a result antithetical to the policy embodied in the Taft-Hartley Act. League Law 13 "invades or frustrates an overriding policy of the labor laws" and therefore cannot lawfully be enforced where the Union initially has failed to inform the member of his right not to be in the Union. *Scofield*, 394 U.S. at 429.

II. THE LEGISLATIVE HISTORY OF THE TAFT-HARTLEY ACT DEMONSTRATES THAT CONGRESS INTENDED NO IMPLIED EXCEPTION TO THE POLICY AGAINST CLOSED SHOPS.

A. The Elimination of Closed Shops Was a Major Goal of the Taft-Hartley Act.

The closed shop was a major target of the Taft-Hartley Act. The report of the House Education and Labor Committee accompanying the House bill stated categorically:

"The bill bans the closed shop." H.R. Rep. No. 245, 80th Cong., 1st Sess. (1947), *reprinted in National Labor Relations Board, Legislative History of the Labor Management Relations Act of 1947*, 300 (1948) [hereinafter cited as "Leg. Hist."]. The Senate Committee on Labor and Public Welfare was more expansive in detailing the evils of the closed shop, but no less certain in its opposition: "It is clear that the closed shop which requires preexisting union membership as a condition of obtaining employment creates too great a barrier to free employment to be longer tolerated. . . . Numerous examples were presented to the committee of the way union leaders have used closed-shop devices as a method of depriving employees of their jobs, and in some cases a means of securing a livelihood in their trade or calling, for purely capricious reasons." S. Rep. No. 105, 80th Cong., 1st Sess. (1947), Leg. Hist. 412.

The Act thus set up the "web" of statutory provisions noted by the Supreme Court in *Scofield*[6] designed to prevent the closed shop. Perhaps the most important of these sections was Section 8(a)(3), which, along with the companion Section 8(b)(2), prohibited the employer and the union from discriminating against an employee whose union membership has been denied or terminated "for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership." 29 U.S.C. § 158(a)(3) (1982).

The House Conference Report noted that these provisions "abolished the closed shop." H. Conf. Rep. No. 510, 80th Cong., 1st Sess. 41 (1947), Leg. Hist. 545. This Court stated that under this provision Congress intended to eliminate "the most serious abuses of compulsory unionism . . . by abolishing the closed shop." *NLRB v. General Motors Corp.*, 373 U.S. 734, 739 (1963).

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[6] 394 U.S. at 429.

B. The Legislative History on Which the Petitioners Rely Does Not Demonstrate A Congressional Intent To Permit An Implied Exception to the Policy Against Closed Shops.

The petitioners discuss at length the legislative history of the Taft-Hartley Act in an effort to show that the Section 8(b)(1)(A) proviso permits the Union to enforce League Law 13.[7] That proviso, however, is concerned only with a union's power to admit and expel members, and nothing in the legislative history bespeaks a congressional understanding that the proviso permits the Union to employ a resignation rule in derogation of the congressional policy against closed shops.

Section 8(b)(1) makes it an unfair labor practice for a union to restrain or coerce employees in the exercise of their Section 7 rights, with the proviso that "this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein." 29 U.S.C. § 158(b)(1)(A) (1982). The proviso had the narrow purpose of ensuring that the congressional prohibition of closed shops did not impair the union's right to set membership criteria and to expel members for failure to remit required financial support. The proviso was not intended to provide a backdoor method for reintroducing closed shops.

As noted before, Section 8(b)(2) in conjunction with Section 8(a)(3) bans the closed shop while permitting

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[7] The petitioners also expend considerable effort attempting to show that the § 7 right to refrain from concerted activities does not affect a resignation rule. The Chamber of Commerce's brief focuses on the congressional policy against closed shops rather than on the policy against restricting an individual's right not to engage in concerted activities. The Chamber therefore does not address in detail the petitioners' arguments regarding the legislative history of § 7, but rather expresses its support of the respondent Board's rebuttal.

the union shop and other lesser forms of compulsory unionism. Section 8(b)(2) permits the union to expel a member only for his failure "to tender the periodic dues and the initiation fees uniformly required as a condition of *acquiring* or *retaining membership.*" 29 U.S.C. § 158(b)(2) (1982) (emphasis added). The similarity of language to Section 8(b)(1)(A) is significant and demonstrates that the proviso's use of "acquisition of retention of membership" was intended simply to bring the generalized prohibition against restraint or coercion of section 7 rights into conformity with the union's power to enforce a valid union-security agreement through expulsion.

The statement by the sponsor of the proviso confirms its limited purpose. Senator Holland offered the amendment from the Senate floor to ensure that Section 8(b)(1) did not "affect at least that part of the internal administration [of the union] which has to do with the *admission* or the *expulsion of members*, that is with the questions of membership." 93 Cong. Rec. 4398 (April 30, 1947), Leg. Hist. 1139 (emphasis added). There is no indication that the proviso was intended to cut a broad swath for union rules permitting them to override other congressional policies, particularly the policy against closed shops.

Similarly, Congress' determination not to enact the proposed Section 8(c)(4) in the House bill cannot be taken as an implied congressional decision to permit a resignation rule that fosters a closed shop. As part of a proposed "employee bill of rights," House Section 8(c)(4) would have specifically made it an unfair labor practice for the union "to deny to any member the right to resign from the organization at any time." Leg. Hist. 53. The Senate conferees rejected almost the entire House package because "the language which protected an employee from losing his job if a union expelled him for some reason other than nonpayment of dues and initiation fees, uni-

formly required of all members, *was considered sufficient protection.*" 93 Cong. Rec. 6601 (June 5, 1947), Leg. Hist. 1540 (remarks of Sen. Taft) (emphasis added). Thus, the failure to enact proposed Section 8(c)(4) cannot be taken as a basis for undercutting the closed shop prohibition because it was the very existence of the closed shop provisions that led to the rejection of the House proposal.

The Taft-Hartley Act contains a broad prohibition against closed shops. The legislative history confirms Congress' resolve to eliminate the closed shop, and nothing in the legislative history indicates an intent to permit union rules to evade that prohibition.

CONCLUSION

In the guise of "maintaining a united front," Pet. Brief 13, the Union here has promulgated a rule that polices the members and forces them to remain in the Union against their will. Because in the first instance the Union failed to disclose to the members their right to avoid full membership, the rule creates a *de facto* closed shop evading the prohibition of the Taft-Hartley Act. League Law 13 thus does not reflect a legitimate union interest and impairs a policy Congress has imbedded in the labor laws. *See Scofield*, 394 U.S. at 430. The Chamber therefore respectfully urges that the decision of the Seventh Circuit be affirmed.

Respectfully submitted,

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Dated: December 19, 1984

No. 83-1894 (9)

In the Supreme Court of the United States

OCTOBER TERM, 1984

PATTERN MAKERS' LEAGUE OF NORTH AMERICA, AFL-CIO, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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QUESTION PRESENTED

Whether the National Labor Relations Board acted within the scope of its authority in deciding that a union rule preventing members from resigning from the union during a strike, or at a time when a strike appears imminent, impermissibly abridges the Section 7 rights of employees to refrain from engaging in union activities.

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 724 F.2d 57. The decision and order of the National Labor Relations Board (Pet. App. 9a-44a), including the decision of the administrative law judge, are reported at 265 N.L.R.B. 1332.

JURISDICTION

The judgment of the court of appeals was entered on December 21, 1983. On April 10, 1984, Justice Stevens extended the time for filing a petition for a writ of certiorari to and including May 18, 1984. The petition was filed on May 18, 1984, and granted on October 1, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at App., *infra*, 1a-2a.

STATEMENT

1. In May 1976, the Pattern Makers' League of North America, AFL-CIO (the League), amended its constitution to provide (Pet. App. 10a-11a, 28a n.3):

> [N]o resignation or withdrawal from an Association, or from the League, shall be accepted during a strike or lockout, or at a time when a strike or lockout appears imminent.

This provision, known as League Law 13, was ratified by the membership of the League's various local associations and became effective in October 1976 (*id.* at 30a).

On May 5, 1977, following expiration of a collective bargaining agreement, the League's Rockford and Beloit associations (the Union or the local unions) began an economic strike against members of the Pattern Jobbers Association, a multi-employer group of manufacturers in Rockford, Illinois and Beloit, Wisconsin. Approximately 43 members initially participated in the strike. Pet. App. 10a-11a, 26a-27a, 30a. Beginning in the fifth month of the strike, around September 11, 1977, and continuing until December 1977, eleven members submitted letters of resignation to the local unions and subsequently returned to work (Pet. App. 11a, 27a-28a; GCX 2-10, 23).[1] The initial resignations occurred in

[1] On October 29, 1984, this Court granted the parties' joint motion to dispense with the filing of a joint appendix, but the record before the Board has been lodged with the Court. "GCX" references are to the General Counsel's exhibits introduced at the hearing before the administrative law judge. "RX" references are to the Union's exhibits. "Tr." refers to the transcript of the hearing.

September at about the time the local unions formally rejected a contract offer from the employers' association that had been made the previous July (Tr. 153-155). Also around that time, officers of the League and the local unions held a meeting attended by about 60 members at which the officers threatened members with physical harm and loss of accrued pension benefits if they crossed the picket line (Pet. App. 31a-32a). The first letter of resignation, from member William Kohl on September 11, stated, "I no longer feel that the union officers are acting in the best interest of the men. We need fair and reasonable negotiators to solve our problems" (Pet. App. 28a & n.1; GCX 2). On October 17, member Pierre LaBounty submitted a resignation letter stating, "I have always believed in the Union and I always will. I have never wanted to leave the Union for any reason, however, it has come down to my family and a hardship. For this reason I must go back to work, and to do this, I must resign from the Union." Pet. App. 28a n.1; GCX 7.

The strike ended on December 19, 1977, after the membership had accepted the employers' contract offer and the parties signed a new collective bargaining agreement (Pet. App. 11a, 27a). By letters dated January 26, 1978, the local unions notified the individuals who had attempted to resign during the strike that their resignations violated League Law 13 and were not accepted, and that fines had been levied against them in an amount roughly equal to their

earnings during the strike (Pet. App. 11a, 28a; GCX 13-20, 24; RX 1, at 45).[2]

2. The Board, substantially adopting the findings and conclusions of the administrative law judge, found that the League and the local unions, petitioners here, violated Section 8(b)(1)(A) of the National Labor Relations Act (NLRA), 29 U.S.C. 158(b)(1)(A), by fining, pursuant to League Law 13, individuals who had resigned from the Union and had then returned to work while the strike continued. In so finding, the Board relied on its decision in *Machinists Local 1327, International Association of Machinists* (*Dalmo Victor*), 263 N.L.R.B. 984, 986 (1982), enforcement denied, 725 F.2d 1212 (9th Cir. 1984), petition for cert. pending, No. 84-494 (filed Sept. 27, 1984), in which the Board invalidated fines pursuant to a similar constitutional provision and held that "a union rule which limits the right of a union member to resign only to nonstrike periods constitutes an unreasonable restriction on a member's Section 7 right to resign." Pet. App. 12a-13a.[3] The Board ordered petitioners to

[2] Unlike the other members who attempted to resign during the strike, member William Kohl was expelled from the Beloit Association following his resignation and return to work. The Union notified Kohl on February 1, 1978 that he would be required to pay $4,200 in fines, back dues in the amount of $211, an additional three months' dues in advance, and a $500 fee in order to be readmitted to the Union. Pet. App. 28a-29a. In the meantime, on January 14, 1978, the Union had requested that Kohl's employer discharge him because he was not a member of the Union as required by the union security provision of the new contract (Pet. App. 29a).

[3] In *Dalmo Victor* the Board invalidated a rule restricting a member's right to resign. Two Members were of the view that any restriction on resignation is invalid under Section 8(b)(1)(A). Two other Members would have permitted a resignation restriction to be effective 30 days from submission.

In *International Association of Machinists, Local Lodge 1414 (Neufeld-Porsche-Audi)*, 270 N.L.R.B. No. 209 (June 22, 1984), the Board adopted the position of the concurrence in *Dalmo Victor* that the Act permits no restriction on the right of union members to resign. The Board's decision in *Neufeld-Porsche-Audi* is set forth in an appendix (at 93a-126a) to the Board's petition for certiorari in *Dalmo Victor*. *NLRB* v. *Machinists Local 1327, International Association of Machinists*, No. 84-494 (filed Sept. 27, 1984).

cease and desist from imposing fines pursuant to League Law 13 on members who resign during a strike and return to work, and to rescind the fines imposed (Pet. App. 17a-18a).[4]

3. The court of appeals enforced the Board's order. In upholding the Board's conclusion that the Union's imposition of fines to enforce League Law 13 violated the Act, the court rejected petitioners' con-

[4] In addition, the Board found that petitioners violated Section 8(b)(1)(A) by threatening members with physical harm and loss of accrued pension benefits if they crossed the picket line, and that the Beloit Association violated Section 8(b)(2) and (1)(A), 29 U.S.C. 158(b)(2) and (1)(A), by conditioning William Kohl's readmission on payment of the fine, dues and excessive fees, and by attempting to have him discharged for his failure under those circumstances to meet the membership obligation imposed by the contractual union security provision (Pet. App. 10a n.3, 37a-38a & n.17). The Board also found that the Beloit Association violated Section 8(b)(2) and (1)(A) by demanding employee John Nelson's discharge in January 1978 for failure to meet the obligations imposed by the union security clause because the Union had never fulfilled its fiduciary duty of explaining to Nelson what his obligations were and Nelson had not joined the Union (Pet. App. 14a-17a). These findings were not contested in the court of appeals and are not in issue here.

tention that the restriction on resignation is protected by the proviso to Section 8(b)(1)(A) allowing a union "to prescribe its own rules with respect to the acquisition or retention of membership" (Pet. App. 4a-7a). Relying on *Scofield* v. *NLRB*, 394 U.S. 423 (1969), the court found that because such a restriction "completely suspends an employee's right to choose not to be a union member and thus no longer subject to union discipline, it frustrates the overriding policy of labor law that employees be free to choose whether to engage in concerted activities" (Pet. App. 6a).

The court also rejected the proposition that, by joining the union and participating in the decision to strike, members forfeited their Section 7 (29 U.S.C. 157) right thereafter to change their minds and abandon the strike by resigning from the union (Pet. App. 5a-7a). The court, citing *NLRB* v. *Granite State Joint Board, Textile Workers Union*, 409 U.S. 213 (1972), stated that "[t]he Section 7 right to refrain from union activities encompasses the right of members to resign from the union. * * * An employee's right to resign cannot be overriden by union interests in 'group solidarity and mutual reliance * * *' upon which the Union so heavily relies." Pet. App. 5a-6a (citation omitted). The court added that "[j]ust as the Union's power may not extend to an employee's post-resignation activities, it also may not extend to forbid an employee from resigning" (*id.* at 7a). Accordingly, the court concluded that the proviso to Section 8(b)(1)(A) does not allow a union to "compel membership during a strike * * * in derogation of an employee's right to choose whether to be a part of such * * * activity" (Pet. App. 7a).

INTRODUCTION AND SUMMARY OF ARGUMENT

In this case the Board has ruled that a union may not restrict a member's right to resign and thus may not extend its disciplinary authority to fine an employee who has unambiguously chosen to terminate his membership. Petitioners represent the Board's ruling as a novel, misconceived and unsettling intrusion into the overall regime of rights and responsibilities fashioned by Congress and elaborated by this Court to govern national labor relations. The precise contrary is the case. The principle proclaimed by the Board—that union discipline is predicated on full membership and that membership must be a voluntary relation—is a logical corollary of the Congressional mandate that employees shall have the right "to form, join, or assist labor organizations" (Section 7) as well as the right "to refrain from any or all of such activities" (*ibid.*). As the legislative history shows, this latter right to refrain from concerted activity is not intended to be simply a once-and-for-all choice, made by an employee when he decides to join the union, which thereafter can be reconsidered only on such terms as the union permits. Nor may the privilege of participation as a union member be extended to employees only on the condition that they accede in advance to restrictions on their right to resign that membership.

1. The Supreme Court, beginning with *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967), has drawn the contours of a union's power over its members on the premise of voluntary membership. The rule announced by the Board in this case simply completes the Court's conception in the only way that makes sense. In the *Allis-Chalmers* case the Court recognized, and in *NLRB* v. *Boeing Co.*, 412 U.S. 67

(1973) refused to involve itself in, the disciplinary authority of a union over its members. But this reticence on the Court's part was emphatically predicated on the wholly voluntary nature of the individual's submission to the union through membership.

In *NLRB* v. *General Motors Corp.*, 373 U.S. 734 (1963), the Court made clear that even Congress's reservation in Section 8(a)(3) of the NLRA of a right of the union to insist on a union security clause went no further than to oblige an employee to pay a fee to cover the cost of the union's activities as the employees' exclusive bargaining representative under the majority rule principle of *J.I. Case Co.* v. *NLRB*, 321 U.S. 332 (1944). Full membership in general and submission to union discipline in particular could not be required. And just as entrance into full membership could not be required, so the Court has held that a union's disciplinary power ought not to survive a member's resignation, even though (in *NLRB* v. *Granite State Joint Board, Textile Workers Union*, 409 U.S. 213 (1972)) the member had participated in a strike vote, and even though (in the Court's more recent and unanimous opinion, *Booster Lodge No. 405, International Association of Machinists* v. *NLRB*, 412 U.S. 84 (1973)) a union's constitution to which a member had subscribed forbade strike-breaking on pain of discipline. Although these two decisions declined to pass on the precise issue in this case, it seems a minor stroke indeed to complete the picture and hold, as did the Board here, that just as a union may not extend its power to those unwilling to accede to the rights and responsibilities of membership by a clause purporting to reach post-resignation conduct, so a union may not extend its disciplinary authority over the disaffected by the

merely technical expedient of limiting a member's right to resign.

2. Under our labor laws an employee is bound to bargain collectively through a union selected by the majority of the bargaining unit and, if there is a union security agreement, he may be required to pay for those representation services. Full membership in the union and amenability to union discipline may never, however, be compelled. The scheme which the Board's ruling in this case affirms and completes represents a consistent, coherent and fair balance of the individual employee's rights and responsibilities in respect to the collectivity which is his mandatory representative in collective bargaining.

The argument of petitioners and the amicus that the Board's ruling disregards those collective responsibilities and allows the individual to "ride free" on the union's sacrifices—to take benefits without accepting the burdens—is an argument without merit and at any rate contradicts the basic premises of our labor laws. Petitioners and the amicus urge that the Board's rule be rejected as it would undermine a union's ability to enforce its position when it counted most: in the focused struggle of a strike. This argument is misconceived. The Court has consistently made clear that such enforced solidarity is not the policy of our labor laws: "the vitality of § 7 requires that the member be free to refrain in November from the actions he endorsed in May and that his § 7 rights are not lost by a union's plea for solidarity or by its pressures for conformity and submission to its regime" (*Granite State*, 409 U.S. at 217-218). The only solidarity which the union is entitled to *enforce* is that which comes from its position as exclusive bargaining agent—*i.e.*, every employee's obligation to pay

the costs reasonably related to the union's duties as exclusive bargaining agent. *Ellis* v. *Railway Clerks*, No. 82-1150 (Apr. 25, 1984), slip op. 11-12; *J.I. Case* v. *NLRB*, *supra*; *NLRB* v. *General Motors Corp.*, *supra*. Nor is it the case that an employee who returns to work while others are on strike "rides free" on their sacrifices in some way not contemplated by the labor laws. This Court has made clear that an employee is absolutely free *never* to submit to such union discipline as is exerted against members during a strike, since an employee may never be compelled to accept full membership as a condition of employment. *NLRB* v. *General Motors Corp.*, *supra*. In *Granite State* and *Booster Lodge* this Court also made clear that a renunciation of the mutual reliance on union solidarity is not inconsistent with national labor policy.

At any rate the "free rider" argument is substantially flawed on its own grounds. Where a union security agreement is in effect the employee has paid and must continue to pay a fee to the union for its collective bargaining services; and in resigning his membership he forfeits his voice in choosing the union's leadership and in formulating its policies—most particularly in formulating its bargaining position and in deciding whether to begin or continue a strike.[5] Wellington, *Union Fines and Workers' Rights*, 85 Yale L.J. 1022, 1045-1043 (1976).

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[5] Moreover, since each employee is bound by the union's representation in collective bargaining (*J.I. Case* v. *NLRB*, *supra*), if the former union member's return to work weakens the union's bargaining position, he will suffer the resulting loss along with all the other employees in the bargaining unit.

In sum, far from undermining the proper balance between union solidarity and individual employee choice, the Board's rule, based as it is on two decades of this Court's exposition of Congressional intent, strikes the proper balance and indeed furthers union democracy. To quote from Dean Wellington (85 Yale L.J. at 1045):

> [U]nions are meant to be democratic institutions. If unfettered freedom to resign so depletes a union's ranks over time that the strength of its strike is sapped, one is tempted to say that the members have spoken, the consensus has evaporated, and the strike should come to an end.

3. The legislative history of the Taft-Hartley Amendments of 1947 confirms that Congress intended to adopt the concept of voluntary unionism, and abolish the requirement that employees submit themselves to union membership and discipline as a condition of employment; the union could require only the payment of dues and fees—"financial core" membership —under a valid union security agreement. At the same time, Congress amended Section 7 of the NLRA to provide employees with the "right to * * * refrain from any or all [concerted] activities," and in Section 8(b)(1)(A) made it an unfair labor practice for a labor union to restrain or coerce employees in the exercise of that right. The sole exception to the Section 7 right to refrain referred to the financial core membership provision. The debates show that these provisions were designed to protect union members, as well as other employees, from union coercion, and specifically to protect their right to return to work during a strike. In this context, the failure to adopt a provision in the House bill expressly referring to the right to resign reflects simply the

conclusion that the provision was redundant and thus unnecessary. Similarly, the context and discussion of the proviso in Section 8(b)(1)(A) protecting the union's right to prescribe rules with respect to "the acquisition or retention of membership" refers simply to rules relating to admission to or expulsion from the union—it does not permit the union to detain unwilling members.

4. Even if Congress's and the Court's mandate on this matter were unclear, which we deny, still the ruling of the Board as the expert agency interpreting that mandate should be upheld so long as it represents a reasonable accommodation of divergent strands in the labor acts, in the legislative history and in the Court's decisions. See, *e.g.*, *NLRB* v. *Weingarten, Inc.*, 420 U.S. 251, 260 (1975). Deference to the Board's expertise is particularly appropriate in this case, which involves the formulation of a prophylactic rule to protect the employee's right of association in the light of the realities of industrial relations.

ARGUMENT

THE NLRB REASONABLY CONCLUDED THAT A UNION RULE THAT RESTRICTS MEMBERS FROM RESIGNING FROM THE UNION DURING A STRIKE OR AT A TIME WHEN A STRIKE APPEARS IMMINENT IMPERMISSIBLY ABRIDGES THE SECTION 7 RIGHT OF EMPLOYEES TO REFRAIN FROM ENGAGING IN UNION ACTIVITIES

A. Prior Decisions Of This Court Establish That Congress Intended To Protect The Freedom Of Employees To Resign From A Union And Escape Union Discipline As A Fundamental Policy Of The Act

Section 1 of the NLRA, 29 U.S.C. 151, declares it "to be the policy of the United States to * * * protect[] the exercise by workers of full freedom of association * * *." To that end, Section 7 (29 U.S.C. 157) protects the right of employees "to self-organization [and] to form, join, or assist labor organizations," as well as the right "to refrain from any or all of such activities." Section 8(b)(1)(A) (29 U.S.C. 158(b)(1)(A)) makes it an unfair labor practice for a union to "restrain or coerce * * * employees in the exercise of the rights guaranteed in section 7." The proviso to Section 8(b)(1)(A) states that the Section "shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein."

Consistently with the policy of protecting workers' full freedom of association, unions may impose discipline under the Act only on employees who choose voluntarily to become and remain full union members. This Court's cases have predicated the union's power to discipline its members on the concept that the employee is a *voluntary* member of the union. The Court first established in *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967), that the exercise of union disciplinary power over present members does not constitute "restraint" or "coercion" of a Section 7 right within the meaning of Section 8(b)(1)(A), on the explicit premise that such members, after all, have voluntarily submitted themselves to union authority (388 U.S. at 196-197). See *NLRB* v. *Boeing Co.*, 412 U.S. 67, 71-72 (1973). In subsequent cases it emphasized this element of voluntary submission to union disciplinary powers. The Court held that Section 8(b)(1)(A) prohibits a union from disciplining employees who resign union membership and thus choose no longer to submit to the union's authority. *NLRB* v. *Granite State Joint Board, Textile Workers Union*, 409 U.S. 213 (1972). The Court subsequently made clear that an employee remains free to resign and re-

turn to work even though the union's constitution, to which the employee has subscribed as a member of the union, forbids strikebreaking on pain of discipline. *Booster Lodge No. 405, International Association of Machinists* v. *NLRB*, 412 U.S. 84 (1973). In both circumstances the Court held that the imposition of discipline impermissibly restricts the exercise of the right to refrain from union activity that is guaranteed by Section 7.

Thus in *Allis-Chalmers*, the Court's holding that a union's imposition of court-enforceable fines on full members pursuant to a rule against strikebreaking did not violate Section 8(b)(1)(A) depended on the premise that "[f]ull union membership [was] not compelled" and that employees were "required only to become and remain 'a member of the Union * * * to the extent of paying * * * monthly dues'" under a union security agreement (388 U.S. at 196 (citation omitted)). The Court, citing *International Association of Machinists* v. *Street*, 367 U.S. 740 (1961), indicated that union members remained free to escape union discipline by resigning (388 U.S. at 196-197 & n.36);* and the fines were upheld because the Court found no evidence in *Allis-Chalmers* "that any of the fined employees enjoyed other than full union membership" (388 U.S. at 196).

Similarly in *Scofield* v. *NLRB*, 394 U.S. 423 (1969), in finding lawful a union rule enforcing a production ceiling on union members who worked on a piece work basis, the Court observed that "a union member, *so long as he chooses to remain one*, * * * is subject to union discipline" (*id.* at 429 n.5 (emphasis supplied)). And it noted that "there is no showing in the record that * * * membership of [the protesting members] in the union was involuntary" (*id.* at 430). The Court stated (*id.* at 435 (emphasis supplied)):

> If [union] members are prevented from taking advantage of their contractual rights [under the piece-work system] * * * it is because they have chosen to become *and remain* union members. * * * If a member chooses not to engage in this concerted activity and is unable to prevail on the other members to change the rule, then he may leave the union and obtain whatever benefits in job advancement and extra pay may result from extra work * * *.

The Court in *Scofield* emphasized that a union rule governing members' conduct is valid under Section 8(b)(1)(A) where it is enforced against employees who choose voluntarily to submit to the rule as a condition of retaining union membership and who "are free to leave the union and escape the rule" (394 U.S. at 430).

In furtherance of this basic premise that Section 8(b)(1)(A) permits union discipline only over those who voluntarily are then union members, the Court has invalidated union attempts to discipline former members who have renounced their obligations to the union by resigning. In *Granite State* and *Booster Lodge* the Court held that unions violate Section 8(b)(1)(A) by imposing fines, pursuant to rules prohibiting strikebreaking by members, on employees who

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* In *Street*, the Court held that employees required to pay dues under a union security agreement had a right to relief against a union that used their dues payments for political purposes, but that their "dissent is not to be presumed—it must affirmatively be made known to the union" (367 U.S. at 774). In the present case, the employees' intention to resign was "not * * * presumed" but was "affirmatively * * * made known to the union."

resign union membership before returning to work.[7] The Court in *Granite State* emphasized that the Section 7 right "to refrain from any or all" union activities includes the right "which normally is reflected in our free institutions—the right of the individual to join or to resign from [a union] as he sees fit" and to return to work during a strike. 409 U.S. at 216. It rejected the union's contention that, by participating in a strike vote and the vote to penalize strikebreaking once the strike began, the individuals forfeited their Section 7 rights thereafter to refrain from the strike by resigning from the union. 409 U.S. 216-217. The Court stated (*id.* at 217):

> Events occurring after the calling of a strike may have unsettling effects, leading a member who voted to strike to change his mind. The likely duration of the strike may increase the specter of hardship to his family; the ease with which the employer replaces the strikers may make the strike seem less provident.

And in *Booster Lodge*, the Court was "no more disposed to find an implied post-resignation commitment from the strikebreaking proscription in the Union's constitution here than we were to find it from the employees' participation in the strike vote and ratification of penalties in [*Granite State*]" (412 U.S. at 89). The *Granite State* Court concluded "that the vitality of § 7 requires that the member be free to refrain in November from the actions he endorsed in

[7] In *Granite State* the rule against working during the strike was imposed by a membership vote after the strike began (409 U.S. at 214); in *Booster Lodge* the union's constitution prohibited members from strikebreaking (412 U.S. at 85), and the union alleged that this prohibition had been understood to survive the employee's resignation (412 U.S. at 89).

May and that his § 7 rights are not lost by a union's plea for solidarity" or its reliance on an individual's earlier decision to strike. 409 U.S. at 217-218.

The question presented here is whether a union can evade the protections of employee resignation rights established in *Granite State* and *Booster Lodge* by the simple expedient of including a clause in its constitution restricting the right to resign during a strike. We submit that the union cannot impose a condition on union membership that would require each member to forfeit his Section 7 right to refrain from union activity, and thereby subject to its disciplinary power employees who no longer wish to remain union members and who resigned union membership before returning to work.[8] Although the Court found it unnecessary to decide that precise issue in either *Granite State* (409 U.S. at 216) or *Booster Lodge* (412 U.S. at 88), since there was no clause specifically restricting resignation in those cases, the presence of such a clause in a union constitution is no more compelling a basis for concluding that employees forfeit their Section 7 right to refrain from a strike by resigning from a union than were the factors the Court rejected in *Granite State* and *Booster Lodge*.

A union rule that requires an employee, upon his initial association with his exclusive bargaining representative, to relinquish his Section 7 right to resign

[8] All of the employees who were disciplined by the Union here had submitted letters of resignation to the Union before returning to work (pages 2-3, *supra*). Since the employees made clear their intention to leave the Union, we do not challenge petitioners' suggestion (Br. 38) that the disciplined employees voluntarily joined the Union in the first instance.

during a strike is no more permissible than the surrender of any other statutory rights affecting an employee's decision to choose a bargaining representative or to participate in collective activity. See *NLRB* v. *Magnavox Co.*, 415 U.S. 322, 325 (1974) (invalidating a contract clause waiving the right of employees lawfully on their employer's premises to use their nonworking time to support or oppose the incumbent union); *Local 900, International Union of Electrical Workers* v. *NLRB* (*Gulton, Inc.*), 727 F.2d 1184, 1190 (D.C. Cir. 1984) (rejecting union contention that employees waived the protection of Section 7 by ratifying a contract clause affording superseniority to certain union officers because the Section 7 right at stake—the right to be free of discrimination encouraging participation in union activity—is not waivable); *NLRB* v. *Niagara Machine & Tool Works*, No. 84-4005 (2d Cir. Oct. 12, 1984), slip op. 13-15 (same). See also *Mastro Plastics Corp.* v. *NLRB*, 350 U.S. 270, 280 (1956); *Metropolitan Edison Co.* v. *NLRB*, 460 U.S. 693, 705-707 (1983). The right to resign from a union in order to refrain from concerted activity is a basic right of association resting on the same legal foundation as the right to choose a bargaining representative that the Court protected against waiver in *Magnavox*.

Petitioners nonetheless seek to justify (Br. 14) a limitation on resignation in a union constitution as a condition of membership that the proviso to Section 8(b)(1)(A) permits unions to impose as part of the union-member "contract." As this Court has made clear, however, the proviso to Section 8(b)(1)(A) does not sanction whatever rule a union might wish to impose on members, but only such rules as "impair[] no policy Congress has imbedded in the labor

laws." *Scofield*, 394 U.S. at 430; accord: *NLRB* v. *Industrial Union of Marine & Shipbuilding Workers*, 391 U.S. 418 (1968) (union rule requiring members to exhaust union remedies before filing unfair labor practice charges with the Board is unenforceable because contrary to the policy of the Act in favor of unfettered access to the Board).[9] Although

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[9] Under the law of contracts, a union constitution is best conceptualized as a contract of "adhesion"—that is, "[t]he member has no choice as to terms but is compelled to adhere to the inflexible ones presented" if he wishes to make his voice heard through his exclusive bargaining representative. Summers, *Legal Limitations on Union Discipline*, 64 Harv. L. Rev. 1049, 1055 (1951) (footnote omitted). It is settled that such a contract is enforceable only to the extent that it is not inconsistent with statutory or other expressed social policies. *Gray* v. *American Express Co.*, 743 F.2d 10, 15-16 (D.C. Cir. 1984). Accord: Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 Harv. L. Rev. 1173, 1206 (1983) ("[o]ne should acknowledge frankly that the question whether to enforce form terms presents a series of policy choices"); Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 Colum. L. Rev. 629, 642 (1943) (The decision whether to enforce contracts of adhesion will depend not only on the "social importance of the type of contract" but also on "the degree of monopoly enjoyed by the author.").

In this connection, it is significant that rules restricting the right to resign from voluntary associations were generally unknown in the common law. Chafee, *The Internal Affairs of Associations Not For Profit*, 43 Harv. L. Rev. 993 (1930). See pages 29-31 & notes 19, 20, *infra*. Moreover, it has been argued that union members are not generally aware of their right to avoid the obligations of full union membership without jeopardizing their jobs, thus casting doubt on the validity of their adhesion to the union-proffered contract in the first instance. Wellington, *supra*, 85 Yale L.J. at 1051-1053; *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. at 215 (Black, J., dissenting).

Although agricultural collectives enjoy a presumptive exemption from the antitrust laws (7 U.S.C. 291, 292), it can

the Court in *Allis-Chalmers*, *Scofield*, and the resignation cases did not face an express restriction on the right to resign, we submit that the fundamental principle of those cases is that the freedom of union members "to leave the union and escape the rule" (*Scofield*, 394 U.S. at 430) underlies the permissibility of all union discipline under Section 8(b)(1)(A), and itself reflects a policy judgment that Congress has imbedded in the Act.

As the Board concluded in *Neufeld-Porsche-Audi*, 270 N.L.R.B. No. 209 (June 22, 1984), and as we show below, this policy is just the logical implementation of the language and legislative history of the Section 7 "right to refrain from any or all [concerted] activities" and the limitations on union or employer conduct impairing that right, embodied in Section 8(b)(1)(A), as well as in Section 8(b)(2), and the second proviso to Section 8(a)(3). Together these provisions serve to prohibit unions from compelling full union membership. *Neufeld-Porsche-Audi*, slip op. 10-11. In addition, as we also show, the language and legislative history of the proviso to Section 8(b)(1)(A) demonstrates that Congress meant only to permit unions to enforce membership rules against individuals for so long as they continue to hold membership voluntarily.[10]

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scarcely be doubted that any effort by such a collective to restrict resignations would be considered a restraint of trade.

[10] As the Board stated in *Neufeld-Porsche-Audi*, slip op. 11:

> [T]he fundamental policy * * * imbedded in the very fabric of the labor laws * * * distinguishes between internal and external union actions. A consistent and enduring basis for distinguishing between internal and external actions is whether the union's action applies only to union members. By unilaterally extending an employee's membership obligation through restrictions on resignation a union artificially expands the definition of internal action and can thus continue to regulate conduct over which it would otherwise have no control * * *.

Finally, whether or not the resigning employees in this case joined the union under the inducement of a union security clause in the original collective bargaining agreement—see notes 2, 8, *supra*—is irrelevant. Even had there been such a clause at the time of their original adherence to full union membership, such adherence would have been as voluntary in the presence of such a union security clause as in its absence, *General Motors*, and the issue in either case is the voluntariness of the adherence to the union after resignation.

B. In Enacting The Taft-Hartley Amendments Of 1947, Congress Proscribed Compelled Union Membership And Protected The Right Of Individuals To Resign From A Union Subject Only To The Requirement That They Pay Dues Under A Valid Union Security Agreement

1. Section 8(3) of the Wagner Act, ch. 372, 49 Stat. 449, permitted unions and employers to enter into agreements requiring that employees become union members as a condition of acquiring employment.[11] Such "closed shop" agreements were widespread and became the primary means by which unions acquired and then exercised power over unwilling members.[12] By threatening employees subject

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[11] The proviso to Section 8(3) stated "[t]hat nothing in this Act * * * shall preclude an employer from making an agreement with a labor organization * * * to require as a condition of employment membership therein * * *."

[12] See Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 Harv. L. Rev. 274, 291-299 (1948); H. Millis & E. Brown, *From the Wagner Act to Taft-Hartley* 435, 440 (1950); Steever, *The Control of Labor Through*

to closed shop agreements with expulsion from the union or a fine enforceable by expulsion, unions enforced adherence to union rules, including those against strikebreaking, under pain of discharge from employment.[13]

Proponents of the Taft-Hartley amendments of 1947 sought the elimination of compelled union membership under closed shop agreements, and the issue was widely debated. See Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 Harv. L. Rev. 274, 291-299 (1948). Congress amended Section 8(3), outlawing closed shop agreements, but permitting agreements under which employees were required to become and remain "members" of the union within 30 days after employment—the union shop agreement. Section 8(a)(3), 29 U.S.C. 158(a)(3). In so doing, Congress provided:

> That no employer shall justify any discrimination against an employee for nonmembership in a labor organization * * * (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

Union Discipline, 16 Cornell L.Q. 212, 214 (1931); S. Rep. 105, 80th Cong., 1st Sess. Pt. 2, at 9-10 (1947) (minority views), *reprinted in* 1 *NLRB Legislative History of the Labor Management Relations Act, 1947*, at 471-472 (1948) [hereinafter cited as *Leg. Hist.*].

[13] See, *e.g.*, *American Telephone & Telegraph Co.*, 6 Lab. Arb. Rep. 31, 34, 45-46 (1947); S. Rep. 105, *supra*, at 9-10, 1 *Leg. Hist.* 471-472; see also Summers, *Disciplinary Procedures of Unions*, 4 Indus. & Lab. Rel. Rev. 15, 26 (1950); Summers, *Legal Limitations on Union Discipline*, 64 Harv. L. Rev. 1049, 1066 (1951) (union rules generally were enforced by suspension, expulsion, or fines enforceable by expulsion).

As a corollary, Section 8(b)(2), 29 U.S.C. 158(b)(2), was added, which made it an unfair labor practice for a union "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."

Notwithstanding the objections that the amendments would reduce unions' disciplinary powers,[14] Congress made a clear policy choice in favor of voluntary unionism, abolishing the requirement that employees submit themselves to union membership and discipline as a condition of employment. See 93 Cong. Rec. 4885 (1947), 2 *Leg. Hist.* 1419 (remarks of Sen. Ball). Congress permitted only union security agreements that required employees to become a "member" of the union after 30 days of employment. See S. Rep. 105, 80th Cong., 1st Sess. 7 (1947), 1 *Leg. Hist.* 413; *Radio Officers' Union* v. *NLRB*, 347 U.S. 17, 40-41 (1954). But only financial membership could be required. The second proviso to Section 8(a)(3), and the corollary Section 8(b)(2) provision, prohibiting union discrimination on grounds related to membership obligations other than failure to pay dues or fees, meant that "union membership" as a condition of continued employment was "whittled down to its financial core." *NLRB* v. *General Motors Corp.*, 373 U.S. 734, 742 (1963); see

[14] See S. Rep. 105, *supra*, at 9-10, 1 *Leg. Hist.* 471.

Union Starch & Refining Co., 87 N.L.R.B. 779, 783-786 (1949), enforced, 186 F.2d 1008, 1012-1013 (7th Cir.), cert. denied, 342 U.S. 815 (1951); *Electrical Workers* v. *NLRB*, 487 F.2d 1143, 1167-1168 n.26 (D.C. Cir.), cert. denied, 418 U.S. 904 (1973). Employees governed by union shop provisions could thus elect to become or remain full members or not. As long as employees remained full members they could not be fired from their job for failure to obey union rules, but could otherwise be disciplined by the union.[15] However, if they paid only dues and fees ("financial core" membership), they could avoid the obligations of full union membership—including union discipline for breach of union rules.[16]

2. This limitation on union power is confirmed by the express language of Section 7. At the same time that Congress amended the union security provisions, it amended Section 7 to provide that "[e]mployees shall have the right to * * * refrain from any or all [concerted] activities except to the extent that such

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[15] See 93 Cong. Rec. 4193 (1947), 2 *Leg. Hist.* 1097 (remarks of Sen. Taft).

[16] Under the union security provisions authorized by the Act, employees are free not only to limit their membership to payment of dues at the outset of their relationship with a union, but also to choose to change their status to financial core membership having previously chosen full membership. See *NLRB* v. *Hershey Foods Corp.*, 513 F.2d 1083, 1086-1087 (9th Cir. 1975); *Local 749, Int'l Brotherhood of Boilermakers* v. *NLRB*, 466 F.2d 343, 344-345 & n.1 (D.C. Cir. 1972), cert. denied, 410 U.S. 926 (1973); *Marlin Rockwell Corp.*, 114 N.L.R.B. 553, 559-560 (1955); *United Stanford Employees*, 230 N.L.R.B. 326, 328-329 (1977), enforced, 601 F.2d 980, 982-983 (9th Cir. 1979). Certainly an employee should have no *less* freedom to avoid union discipline when the contract contains no union security clause.

right may be affected by a [union security agreement] authorized in Section 8(a)(3)."[17] Congress thus provided in the clearest possible terms that the "financial core" membership requirements of Section 8(a)(3) were the only permissible restriction on the employee's right to refrain from union activities. With this single limited exception, the employee was to be free to refuse to participate in any collective activity—a freedom that necessarily includes the right to resign from the union and return to work.

Congress implemented the "right to refrain" afforded in the amended Section 7 by adding Section 8(b)(1)(A), which makes it an unfair labor practice for a union "to restrain or coerce * * * employees in the exercise of the rights guaranteed in Section 7." The debate concerning that provision makes clear that the provision, coupled with the amendment to Section 7, was intended to insure that employees, including union members, would be protected against union restraint or coercion in any decision to refrain from union or other concerted activity, including a strike. Thus, when Section 8(b)(1)(A) was introduced on the Senate floor by Senator Ball (93 Cong. Rec. 4016 (1947), 2 *Leg. Hist.* 1018),[18] Senator Ives inquired

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[17] The "right to refrain" language originated in the House bill and was incorporated into the final bill in conference. As conceived in the House bill, the "right to refrain" language "meant simply that a man shall have the right to join or not to join, to be bound by or not to be bound by, union rules." 93 Cong. Rec. 3554 (1947), 1 *Leg. Hist.* 733 (remarks of Rep. Hoffman).

[18] The provision as first introduced made it an unfair labor practice for a labor organization "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." The phrase "interfere with" was subsequently eliminated because it was believed to be too vague. 93 Cong. Rec. 4270-4271 (1947), 2 *Leg. Hist.* 1138-1139.

whether the union security amendments prohibiting compelled membership were not sufficient to prevent the type of union coercive conduct at which the section was aimed. Senator Taft responded that Section 8(b)(1)(A) was designed to prohibit threats, economic reprisals, and other forms of union coercion that would not be reached by the union security amendments. 93 Cong. Rec. 4142 (1947), 2 *Leg. Hist.* 1025-1026. Senator Taft explained that, while the amendment protected employees who may not be members of unions at all, it also was necessary to protect union members from the "arbitrary powers which have been exercised by some of the labor union leaders," which in some cases have subjected them "to treatment which interferes with their rights as American citizens." 93 Cong. Rec. 4023 (1947), 2 *Leg. Hist.* 1028. He added that the amendment merely makes clear that unions, no less than employers, "do not have the right to interfere with or coerce employees, either their own members or those outside the union." 93 Cong. Rec. 4025 (1947), 2 *Leg. Hist.* 1032.

Later in the debates, Senator Taft, in response to the charge that Section 8(b)(1)(A) would prevent unions from engaging in a strike, stated (93 Cong. Rec. 4436 (1947) (emphasis added), 2 *Leg. Hist.* 1207):

> It would not outlaw anybody striking who wanted to strike. It would not prevent anyone using the strike in a legitimate way, conducting peaceful picketing, or employing persuasion. *All it would do would be to outlaw such restraint and coercion as would prevent people from going to work if they wished to go to work.*

And in his supplemental analysis of the conference bill, Senator Taft explained that the "right to refrain"

language in Section 7, coupled with Section 8(b)(1)(A), specifically prohibited "coercive acts of unions against employees who did not wish to join or did not care to participate in a strike or picket line." 93 Cong. Rec. 6859 (1947), 2 *Leg. Hist.* 1623.

3. In sum, by amending the union security provisions, and by expressly protecting the right of union members to refrain from union and other concerted activities free of union coercion, Congress made clear that the assumption of any burdens or obligations of union membership beyond the payment of dues and fees was a purely voluntary matter for each employee, and that, even if an employee had joined the union, he could not be forced to remain a member. For, unless the member were free to resign his membership and thereby avoid union discipline, his Section 7 right to refrain from engaging in union and other concerted activities would be rendered nugatory. Accordingly, the Board correctly concluded that "[t]his statutory right encompasses not only the right to refrain from strikes, but also the right to resign union membership." *Neufeld-Porsche-Audi*, slip op. 10. See also *Marlin Rockwell Corp.*, 114 N.L.R.B. 553, 560 (1965) (emphasis in original) (decision to leave a union after having joined it is "an act not qualitatively different from the refusal by employees *to join* a union").

Petitioners rely (Br. 22-34) on Congress's failure to adopt the provisions of the House bill that specifically protected the right to resign from a union. They incorrectly assert that that failure demonstrates that Congress did not intend to protect the right to resign when it added the "right to refrain" language to Section 7 and enacted the final version of Section 8(b)(1)(A). Section 8(b)(1) of the House bill would have made it an unfair labor practice for a

union, "by intimidating practices, to interfere with the exercise by employees of rights guaranteed in section 7 * * * or to compel or seek to compel any individual to become or remain a member of any labor organization" (H.R. 3020, 80th Cong., 1st Sess. § 8(b)(1), at 21-22 (1947), 1 *Leg. Hist.* 178-179). The Conference Report makes clear that the final version of Section 8(b)(1)(A) was broad enough to include these specific unfair labor practices, and that the House bill's language was therefore merely redundant. H.R. Conf. Rep. 510, 80th Cong., 1st Sess. 44 (1947), 1 *Leg. Hist.* 548.

Section 8(c)(4) of the House bill, which would have made it an unfair labor practice for a union "to deny to any member the right to resign from the organization at any time" (H.R. 3020, *supra*, § 8(c)(4), at 23, 1 *Leg. Hist.* 180), was similarly redundant. Although Section 8(c) generally contained detailed provisions granting new statutory rights to members in their relations with unions, provisions that were rejected in the conference agreement (H.R. Conf. Rep. 510, *supra*, at 46 (1947), 1 *Leg. Hist.* 550), Section 8(c)(4) was intended only to preserve the *existing* right of members to resign. Thus, the House Report on Section 8(c)(4) stated that "[t]he right to resign from any organization is a fundamental right. This section *preserves* that right for union members." H.R. Rep. 245, 80th Cong., 1st Sess. 32 (1947) (emphasis added), 1 *Leg. Hist.* 323. But resigning from a union is merely one way of exercising the right to refrain from joining or supporting a union that was embodied in Section 7. Indeed, this Court so recognized in *Granite State* and *Booster Lodge* in sustaining the Board's conclusion that the unions violated

Section 8(b)(1)(A) by fining employees for resigning from the union and going to work during a strike. Because the more general "right to refrain" language added to Section 7 encompasses the specific act of resigning from the union, it is reasonable to assume that Congress believed that a specific provision covering resignation was unnecessary.

Moreover, Section 8(c)(4) of the House bill appears to have been specifically directed at the burden that closed shop agreements under the Wagner Act imposed on the right to resign. Referring to the House provision governing union security, a provision similar to the provisions in the final bill, the House Report made clear that the right to resign was protected subject only to the requirement that employees governed by union security agreements pay dues. H.R. Rep. 245, *supra*, at 34, 2 *Leg. Hist.* 325. Congress having protected the right to resign in Section 7 and Section 8(b)(1)(A), and having prohibited closed shop agreements in the union security amendments, there was no need for inclusion of House Section 8(c)(4). See F. Hartley, *Our New National Labor Policy* 81-83 (1948) (explanation by sponsor of the House bill that "the union shop provisions prohibiting a labor union from seeking the discharge of any member for any reason other than non-payment of * * * dues * * * will * * * prevent internal labor union abuse" at which parts of Section 8(c) were directed).

This view of the legislative history is buttressed by the fact that, at the time Congress acted, it was generally understood that employees were free to withdraw from a union if they chose. Thus, unions had the authority to prescribe rules governing the conduct of those who chose to maintain membership, but members were free to resign at will, subject only "to

any financial obligations due and owing." *Communications Workers* v. *NLRB*, 215 F.2d 835, 838 (2d Cir. 1954). As the court stated in *Bossert* v. *Dhuy*, 221 N.Y. 342, 365, 117 N.E. 582, 587 (1917):

> Voluntary orders by a labor organization for the benefit of its members and the enforcement thereof within the organization [are] not coercion. The members of the organization * * * who are not willing to obey the orders of the organization are at liberty to withdraw therefrom.

Similarly, the court stated in *Longshore Printing & Publishing Co.* v. *Howell*, 26 Or. 527, 540, 38 P. 547, 551 (1894), "It must be understood * * * that [unions] like other voluntary societies must depend for their membership upon the free and untrammeled choice of each individual member. No resort can be had to compulsory methods of any kind either to increase, keep up, or retain such membership." [19] Given the common law background, and Congress's decision to prohibit compelled union membership and expressly to protect the right to refrain from union activity, there was no need expressly to protect the right to resign.[20]

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[19] See also *Barker Painting Co.* v. *Bhd. of Painters*, 23 F.2d 743, 745 (D.C. Cir. 1927), cert. denied, 276 U.S. 631 (1928); *Arnold* v. *Burgess*, 241 App. Div. 364, 369, 272 N.Y.S. 534, 539 (1934); *Bohn Manufacturing Co.* v. *Hollis*, 54 Minn. 223, 232-233, 55 N.W. 1119, 1120-1121 (1893); *Mayer* v. *Journeymen Stonecutters' Ass'n*, 47 N.J. Eq. 519, 524, 20 A. 492, 494 (1890); *Mische* v. *Kaminski*, 127 Pa. Super. 66, 91-92, 193 A. 410, 421 (1937); *Bayer* v. *Bhd. of Painters*, 108 N.J. Eq. 257, 261-262, 154 A. 759, 761 (1931) (union rules requiring employees to retain membership against their will were unknown at common law); see generally *Developments in the Law—Judicial Control of Actions of Private Associations*, 76 Harv. L. Rev. 983 (1963).

[20] The cases cited by petitioners in support of their argument that unions had the authority at common law to restrict

resignations (Br. 35-38) are far removed from the union-member relationship. Two of the cases stand for no more than that associations at common law could impose certain procedural limitations on withdrawal that did not otherwise impair the right voluntarily to resign (*Colonial Country Club* v. *Richmond*, 140 So. 86 (La. 1932) (resignation notice must be delivered to specified officer)), and could require that financial charges accrued and owing be paid prior to resignation (*Boston Club* v. *Potter*, 212 Mass. 23, 27, 98 N.E. 614, 615 (1912)). In *Ewald* v. *Medical Society*, 144 A.D. 82, 84-85, 88-89, 128 N.Y.S. 886, 888, 891 (N.Y. App. Div. 1911), the court upheld the right of a medical society to protect its professional reputation by processing pending ethical charges against a member prior to accepting his resignation. And in *Associated Press* v. *Emmett*, 45 F. Supp. 907, 919-920 (S.D. Cal. 1942), the court upheld a liquidated damages provision in the amount of two years' dues, and an attendant restriction on withdrawal, in the contract of a worldwide wire service organization with a member newspaper because the wire service was "not in a position, by the very nature of its operations, to rely upon a court to fix the damages at the time of the breach of its membership contract."

The other cases cited by petitioner (*Troy Iron & Nail Factory* v. *Corning*, 45 Barb. 231 (N.Y. 1864); *Leon* v. *Chrysler Motors Corp.*, 358 F. Supp. 877 (D.N.J. 1973), aff'd mem., 474 F.2d 1340 (3d Cir. 1973); and *Kingston Dodge Inc.* v. *Chrysler Corp.*, 449 F. Supp. 52 (M.D. Pa. 1978)), are cases in which members of associations sought to cease paying for services which they continued to receive without giving up any other benefit of membership, and the associations sued to recover the individual's share of payments for those services. Here, union members who resign foreswear the benefit of full membership and even after resigning they may be required to pay the costs of the union in representing the collective bargaining unit under a union security agreement. Thus those cases in no way support the proposition that there is at common law a power in an association to restrict the right to resign or to impose continuing obligations of the kind involved here on those who have resigned.

In any event, we are far removed from a common law setting with respect to how and whether employees associate

C. The Proviso To Section 8(b)(1)(A) Preserves The Common Law Authority Of Unions To Enforce Reasonable Rules Governing The Conduct Of Those Who Choose Voluntarily To Maintain Membership, But Does Not Allow Unions To Force Employees To Retain Membership Against Their Will

1. While prohibiting all forms of compulsion that require any employee to be a member of a union, and protecting the common law right to resign in the "right to refrain" language of Section 7, Congress enacted the proviso to Section 8(b)(1)(A) stating that "this [Section] shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein[.]" Petitioners contend (Br. 14, 18-21, 32) that this proviso further shows that Congress did not intend, by adding the "right to refrain" to Section 7 of the Act, to prevent unions from restricting the right to resign by a provision in a union constitution. This contention is without merit.

At the outset, contrary to petitioners' contention (Br. 18), the plain meaning of the phrase "rules with respect to acquisition or retention of membership" encompasses rules respecting admission or expulsion from the organization—not rules which prevent members who wish to leave the organization from doing so at the time they wish. It simply means that the union need not accept or keep members it does not want; it does not mean that the union can acquire and retain those who wish to refrain from membership. In that respect the statute is symmetrical: membership cannot be forced upon either the union or the employee. Petitioners' reading of this proviso is, therefore, no more than a pun on the meaning of the word retention. The statute obviously was intended to leave unions free to decide who of those who wish to remain members it will retain. It did not address the situation where a union wished to retain—or, perhaps better, detain—a person who no longer wished to be a member.

The legislative history of the proviso confirms this interpretation of its purpose. Section 8(b)(1)(A) as originally offered by Senator Ball (see page 25, *supra*) did not contain the proviso. It was offered by Senator Holland, in the midst of the debate on Section 8(b)(1)(A),[21] after discussing with Senators Taft and Ball "how seriously, if at all, [Section 8(b)(1)(A)] would affect the internal administration of a labor union" (93 Cong. Rec. 4271 (1947), 2 *Leg. Hist.* 1139). Senator Holland stated (93 Cong. Rec. 4271, 4272 (1947) (emphasis added), 2 *Leg. Hist.* 1139, 1141):

> Apparently it is not intended by the sponsors of [Section 8(b)(1)(A)] to affect at least that part of the internal administration *which has to do with the admission or the expulsion of members*, that is with the question of membership. So I offer an amendment [adding the proviso in its present terms].
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> * * * * *

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with unions. So-called "yellow dog contracts," by which employees agreed with their employer not to associate with unions, are outlawed by Section 7 of the Norris-La Guardia Act, 29 U.S.C. 107.

[21] Section 8(b)(1)(A) was introduced on the floor of the Senate on April 25, 1947, and was discussed that day. On April 29, the union shop and Section 8(b)(2) amendments were discussed. On April 30, discussion of Section 8(b)(1)(A) resumed and the proviso was introduced on that day. On May 2, the Senate adopted Section 8(b)(1)(A) and its proviso. 93 Cong. Rec. 4016, 4191, 4270, 4442 (1947), 2 *Leg. Hist.* 1018, 1094, 1136, 1217.

> In other words, * * * the inserted words would make it clear that the pending amendment would have no application to or effect upon the right of a labor organization to prescribe its own rules of membership either with respect to beginning or terminating membership.

Immediately following the statements of Senator Holland, the debate returned to union security, and Senators Taft, Ball, and Pepper engaged in the following discussion (93 Cong. Rec. 4272 (1947) (emphasis added), 2 *Leg. Hist.* 1141-1142):

> Senator Pepper: In discussion yesterday between the Senator from Ohio [Senator Taft] and myself with respect to another part of the bill, dealing with the closed shop or the union shop, the Senator from Ohio stated what I recall his having stated in the committee, that if a union claimed the advantage or the status of a closed shop or union shop, it would have to have what the Senator called democracy in respect to the admission of members. I understood the Senator to say that that would mean that anyone who presented himself and was qualified in other respects for membership, and who complied with the usual conditions for membership, such as the payment of dues, and so forth, would be entitled to membership.
>
> Senator Taft: I did not say that * * *. *The union could refuse the man admission to the union, or expel him from the union*; but if he were willing to enter the union and pay the same dues as other members of the unicn, he could not be fired from his job because the union refused to take him.
>
> Senator Pepper: Am I correct * * * that there is no provision of the bill which denies a labor union the right to prescribe the qualifications of its members, and that if the union wishes to discriminate in respect to membership, there is no provision in the bill which denies it the privilege of doing so?
>
> Senator Ball: Absolutely not. If the union expels a member of the union for any other reason than nonpayment of dues, and there is a union-shop contract, the union cannot under that contract require the employer to discharge the man from his job. *It can expel him from the union at any time it wishes to do so*, and for any reason.
>
> Senator Pepper: *And the union can admit to membership anyone it wishes to admit*, and decline to admit anyone it does not wish to accept[?]
>
> Senator Ball: That is correct.

The remarks by Senator Holland, the author of the proviso, in the context of the ongoing debate on the effects of Section 8(b)(1)(A) and the union security amendments on union membership rules, demonstrate that Congress intended in the proviso to preserve only the power of unions to *admit* or *expel* individuals wanting to gain or maintain membership. These were the only valid aspects of union power that were mentioned in the debates and inserted into the statutory language. Congress did not intend by the proviso to expand the union's power to prescribe rules restricting the right of members to leave the union if they so desired. If the proviso had the effect which petitioners contend it has, it would overwhelm the employees' Section 7 right to refrain from union activity.

2. The Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 401 *et seq.*, confirms the limited scope of the proviso and the view that Congress intended that union members be free to withdraw from membership. While preserving the power

of unions to fine, suspend or expel members—the traditional forms of discipline—subject to certain procedural safeguards in Section 101(a)(5), 29 U.S.C. 411(a)(5), Congress provided in the definition section (29 U.S.C. 402(*o*) (emphasis added)) that:

> "Member" or "member in good standing," when used in reference to a labor organization, includes any person who has fulfilled the requirement for membership in such organization, and *who neither has voluntarily withdrawn from membership* nor has been expelled or suspended from membership after appropriate proceedings consistent with lawful provisions of the constitution and bylaws of such organization.

In debates on the LMRDA, Representatives Landrum and Griffin, sponsors of the bill that became law, stated their view that the proviso to Section 8(b)(1)(A) adequately protected the power of unions to decide whether to *admit* and *expel* members, and stated further that the LMRDA was not intended to alter the scope of the proviso. 105 Cong. Rec. 15722-15723 (1959), reprinted in 2 *NLRB Legislative History of the Labor-Management Reporting and Disclosure Act of 1959*, at 1649. There is no suggestion anywhere in the legislative history that Congress intended to allow unions to force employees to retain membership against their will during a strike, or at other times. As this Court observed in *NLRB* v. *Truck Drivers Local Union 639 (Curtis Bros.)*, 362 U.S. 274, 291 (1960), "[t]o be sure, what Congress did in 1959 does not establish what it meant in 1947. However, as another major step in an evolving pattern of regulation of union conduct, the 1959 Act is a relevant consideration."

In sum, Congress in 1947 made a clear policy choice in favor of voluntary unionism, prohibiting compelled full union membership under union security agreements and expressly protecting the right of employees to refrain from union activity. The Board reasonably concluded that a rule specifically restricting the right to resign during a strike, no less than the employee votes or constitutional provision asserted in *Granite State* and *Booster Lodge*, violates Section 8(b)(1)(A) by rendering illusory an employee's Section 7 right to refrain from union activity.

D. The Board's Interpretation Reasonably Reflects National Labor Policy

This Court emphasized only last Term that "[w]e have often reaffirmed that the task of defining the scope of § 7 'is for the Board to perform in the first instance as it considers the wide variety of cases that come before it', * * * and, on an issue that implicates its expertise in labor relations, a reasonable construction by the Board is entitled to considerable deference." *NLRB* v. *City Disposal Systems, Inc.*, No. 82-960 (Mar. 21, 1984), slip op. 6 (citations omitted). In this case also the Board has exercised its "primary responsibility of marking out the scope of the statutory language and * * * 'of applying the general provisions of the Act to the complexities of industrial life . . . and of "[appraising] carefully the interests of both sides of any * * * controversy in the diverse circumstances of particular cases" from its special understanding of "the actualities of industrial relations."'" *Ford Motor Co.* v. *NLRB*, 441 U.S. 488, 496 (1979) (citations omitted). Thus, even if this Court does not agree with our submission that the Board's construction is compelled by the statute, by

its legislative history and by this Court's prior decisions, that construction is surely at least a *permissible* interpretation of the statute and its underlying policies, and, as such, should be sustained. *NLRB* v. *Weingarten, Inc.*, 420 U.S. 251, 260 (1975); *NLRB* v. *Iron Workers*, 434 U.S. 335, 350 (1978). That free association is the premise of union disciplinary authority according to this Court's decisions cannot be denied. *Allis-Chalmers, Scofield, Granite State, Booster Lodge.* Surely it is competent for the Board—even if it were not compelled by prior decisions—to fashion a strong prophylactic rule to effectuate that general principle in the light of its understanding of the realities of industrial relations.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

The relevant provisions of the National Labor Relations Act, as amended, 29 U.S.C. 151 *et seq.* are as follows:

Section 7, 29 U.S.C. 157.

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Section 8(a), 29 U.S.C. 158(a).

> It shall be an unfair labor practice for an employer—
>
> * * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization * * * to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employ-

ment or the effective date of such agreement, whichever is the later, * * * *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization * * * if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

Section 8(b), 29 U.S.C. 158(b).

It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; * * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of []section [8](a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

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and

ROCKFORD-BELOIT PATTERN JOBBERS ASSOCIATION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

ARGUMENT

1. The National Labor Relations Board begins its argument by correctly stating that it is the policy of the Labor Mangement Relations Act of 1947 ("LMRA") to protect "the exercise by workers of full freedom of association." NLRB Br. at 12, quoting LMRA § 1, 29 U.S.C. § 151. The Board *assumes* that "full freedom of association" means that an individual is free to terminate his membership in an organization whenever and however the individual chooses and without regard to the rules of the organization. This fallacious assumption is the distorted lens through which the Board reads the language

of the statute, the legislative history, and this Court's precedents. Accordingly, we begin by demonstrating the error of this underlying assumption.

Subject to limitations not relevant here, freedom of association most certainly includes the right of each individual to determine for himself which organizations he will seek to join. But that freedom is a richer and more complex concept than the Board allows. Freedom of association also includes the right of members of an organization, again subject to conditions not immediately relevant, to establish their own rules of membership and to require individuals who seek to join the organization to accept and abide by those rules until the group decides to change the rules. As the Court stated in *Democratic Party of U.S. v. Wisconsin*, 450 U.S. 107, 122 (1981), in the political context, the freedom to associate "necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only." *Id.* at 122. The Court added:

> A political party's choice among the various ways of determining the makeup of a State's delegation to the party's national convention is protected by the Constitution.[26]

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[26] Cf. *Ripon Society, Inc. v. National Republican Party*, 173 U.S. App. D.C. 350, 368, 525 F.2d 567, 585 (en banc) ("[a] party's choice, as among various ways of governing itself, of the one which seems best calculated to strengthen the party and advance its interests, deserve the *protection* of the Constitution . . .") (emphasis of the court), *cert. denied*, 424 U.S. 933.

[450 U.S. at 124 & n.26.]

The point is not that union membership rules of the kind at issue here are beyond Congress' power to regulate but rather that the Board errs in proceeding on the assumption that the policy of "full freedom of association" stated in § 1 of the LMRA implies a congressional decision to permit employees to join unions on an "at-will" basis even though the union members have established

limitations on the time and circumstances under which an individual who chooses to join the union may resign his membership. To the contrary, the policy favoring associational freedom is better read to mean that Congress intended to protect the right of union members to make and enforce rules binding on all who voluntarily join the organization, including rules governing resignations.[1]

2. The Board attempts to buttress it's misconceived view of the "full freedom of association" by asserting that "rules restricting the right to resign from voluntary associations were generally unknown in the common law." NLRB Br. at 19 n.9.[2] If by that the Board means simply that, in general, private associations have not *chosen* to adopt rules restricting the right to resign and that therefore members generally are free to resign at will, the Board may well be correct. But if the Board intends to imply that where the members of an organization adopt a rule regulating resignation that rule would not be enforceable at common law, the Board is simply wrong; as we showed in our opening brief, the common law rule—applied in the numerous cases we cited at pp. 35-37 of our brief—is that "[w]here the rules of an association provide for the withdrawal of members, there can be no withdrawal except in the matter and on the conditions prescribed." Petr. Br. at 35, *quoting* 7 C.J.S. *Associations* § 22. Thus, the common law of membership associa-

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[1] The Board "do[es] not challenge . . . that the disciplined employees voluntarily joined the union in the first instance." NLRB Br. at 17-18.

[2] In support of that statement the Board cites Chafee, *The Internal Affairs of Associations Not for Profit*, 43 Harv. L. Rev. 993 (1930). The Board does not illuminate its citation with any indication as to what within that article the Board believes supports its assertion, and our reading of the article discloses no discussion that in any way speaks to, much less supports, the Board's statement.

tions supports our view—and not the Board's view—of the meaning of associational freedom.[3]

3. The Board's attempt to ascribe to the decisions in *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967),

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[3] The Board asserts that the cases we cited in our opening brief applying the common-law rule "are far removed from the union-member relationship." NLRB Br. at 30-31 n.20. But of course our point in citing those cases was to illustrate the *general* rule pertaining to associations, and the Board does not deny that the cases we cited support the statement of black-letter law set forth in text. The Board is thus reduced to arguing that the rule that applied to every other type of membership association did not apply to unions. *See* NLRB Br. at 29-30 & n.10.

None of the cases the Board cites supports that peculiar proposition. Those cases did not involve a union attempt to enforce a restriction on resignations and so far as can be determined from the opinions, the unions in those cases did not even have a resignation rule. Indeed, in the first case the Board cites, which was decided after the enactment of the LMRA, the court noted that "the Union itself recognized a right to resign," and stated:

> We agree that the proviso [to § 8(b)(1)(A)] protects the Union's right to make its own rules with respect to membership, but assuming, *arguendo*, that a rule wholly prohibiting voluntary resignations would be valid, we think that in the absence of any rule on the subject of voluntary resignation, the proviso is inapplicable. [*Communication Workers v. NLRB*, 215 F.2d 835, 837 n.5, 838 (2d Cir. 1954).]

Thus, neither *Communication Workers* nor the other cases the Board cites stands for the proposition "that, at the time Congress acted, it was generally understood that . . . members were free to resign at will," NLRB Br. at 29, and the dictum in those cases concerning the freedom of members to resign simply reflect the common-law rule that in the *absence* of a resignation restriction members of a voluntary association are free to resign at will.

The Board also cites in this context *Developments in the Law—Judicial Control of Private Associations*, 76 Harv. L. Rev. 983 (1963). The Board prefaces the citation with the words "see generally"; we have done so and we can find nothing in that Note of relevance to the subject of resignations from unions or other membership associations.

and its progeny the "basic premise that Section 8(b)(1)(A) permits union discipline only over those who voluntarily are then union members," NLRB Br. 15, is equally flawed.

We agree, *see* Petr. Br. 16-17 & n.4, that this Court's decisions establish that union rules are binding only on, and enforceable in court only against, employees who choose to become full union members. But that is because, as the Court has explained, "the power of the union over the member is certainly no greater than the union-member contract." *NLRB v. Textile Workers*, 409 U.S. 213, 217 (1972). In this case, however, the Board is contending that the union's power is *lesser* than the union-member contract—that a critical aspect of that contract, the provision regulating resignations, is unenforceable as a matter of federal law. That proposition hardly follows from the prior holdings confining the union's disciplinary power to the union-member contract. Thus, the fact that union rules are unenforceable against persons who do not choose to become full union members tells us nothing about the extent to which union rules limiting resignation are enforceable against those who do choose to do so.

It is also true that in each case in which this Court has upheld union discipline the union in question had not adopted a rule limiting resignation, and the Court has recognized that where an employee "may leave the union" and has "chosen to become and remain [a] union member," *Scofield v. NLRB*, 394 U.S. 423, 235 (1969), his claim that union discipline is coercive and hence violative of § 8(b)(1)(A) is particularly weak. But that recognition falls well short of an endorsement of the proposition that full union members have an absolute freedom to leave the union however and whenever they desire.

Indeed, in those cases in which the Court has held union discipline of a former member *unlawful*, the Court has relied on the fact that the unions there did *not* have

any regulation governing resignations to prove that the member's resignation ended the contractual relationship between the union and the member and hence ended the union's power to enforce the contract. For example, the Court in *Textile Workers* reasoned as follows:

> The *Scofield* case indicates that the power of the union over the member is certainly no greater than the union-member contract. Where a member lawfully resigns from a union and thereafter engages in conduct which the union rule proscribes, the union commits an unfair labor practice when it seeks enforcement of fines for that conduct. That is to say, when there is a lawful dissolution of a union-member relation, the union has no more control over the former member than it has over the man in the street. [409 U.S. at 217].

Thus, the predicate for the holding in *Textile Workers* was the absence of a rule governing resignations.[4] And the lesson to be drawn from *Textile Workers* and the other cases is that the enforcement of a union rule, through legal procedures, as against one who assented to the rule by voluntarily joining the union generally is not unlawful.

4. The Court has recognized one exception to the general rule permitting unions to enforce the union-member contract: enforcement is not permitted if a particular union rule "frustrates an overriding policy of the labor

[4] This is clear in the very sentence of *Textile Workers* which the Board quotes in part in concluding its discussion of this Court's decisions. *See* NLRB Br. at 16-17. The Board's partial quotation attributes to the Court the following conclusion: "the vitality of § 7 requires that the member be free to refrain in November from the actions he endorsed in May . . ." *Id.* In fact, however, what the Court actually said is that "*where, as here, there are no restraints on the resignation of members,* we conclude that the vitality of § 7 requires . . ." 409 U.S. at 217 (emphasis added). That sentence read in full leaves no doubt that, at the very least, this Court's decisions do not rest on the premise that the precondition for lawful union discipline is that the disciplined member is free to resign at will.

laws." *Scofield*, 394 U.S. at 429. The Board argues that a rule restricting resignations does "frustrate" federal labor policy, and the Board points to two sources within the LMRA (aside from § 1 discussed above) which it is said embody a policy allowing union members to resign at will. Neither source provides sustenance to the Board.

(a) The Board first relies on the LMRA provisions respecting union security agreements, *i.e.*, the congressional decision to ban collective bargaining agreements which require employees to become full union members as a condition of employment and to permit only those union security agreements which condition employment on the payment of union dues. *See* NLRB Br. at 21-24. The Board finds in that congressional decision "a clear policy choice in favor of voluntary unionism." *Id.* at 23. But the Board wholly misunderstands the nature of the policy that Congress in fact adopted.[6]

[5] In connection with the *Scofield* qualification quoted in text the Board observes that "a union constitution is best conceptualized as a contract of adhesion." NLRB Br. at 19 n.9. While the relevance of the observation is not immediately apparent to us, we nonetheless hasten to point out that the suggested "conceptualiz[ation]" is in any event unsound. Unlike a contract of adhesion, the terms of a union constitution are determined by the *members* acting through democratic processes, and the terms can likewise be changed by the members if the majority so desires. *See Allis-Chalmers*, 388 U.S. at 190-91 & n.27. Because that is so, no court has declined to enforce a provsion of a union constitution on the theory the Board here propounds, and this Court has not only sustained union constitutions but also has deferred to the union's construction of its constitution. *See Boilermakers v. Hardeman*, 401 U.S. 233 (1971); *Steelworkers v. Sadlowski*, 457 U.S. 102 (1982).

[6] The Board also gravely overstates the degree to which the union rule at issue here deprived union members of the freedom to leave the union. The rule at issue here prohibits resignations only "during a strike or lockout, or at a time when a strike or lockout appears imminent." Moreover, that rule—which was adopted by the vote of the members—was enacted ten months before a strike began, and any individual who was dissatisfied with the rule was free to resign during that interval.

The point of §§ 8(a)(3) & (b)(2), as this Court has explained, is to "prevent[] the union from inducing the employer to use the emoluments of the job to enforce the unions' rules." *Scofield*, 394 U.S. at 429. Congress understood—as the Board now does not—that there is a world of difference between union actions enforceable against all employees through sanctions applied by the employer (including loss of employment), and union actions that do not affect job rights, enforceable only through internal union proceedings or the courts and enforceable only against those who choose to become full union members. Congress concluded that only the former threatens "voluntary unionism" and Congress acted to secure such voluntarism by barring employment-related sanctions.

There is not one word in the legislative history to suggest that Congress viewed union enforcement of its own rules, including rules restricting resignations, as inconsistent with "voluntary unionism" or that Congress acted to interfere with such enforcement.[7] To the contrary, the legislative history shows that "Congress intended to distinguish between the external and internal enforcement of union rule." *NLRB v. Boeing Co.*, 412 U.S. 67, 73 (1972). As Senator Taft explained, in discussing § 8(b)(2):

> *The pending measure does not propose any limitation with respect to the internal affairs of unions.* They still will be able to fire any members they wish to fire, *and they still will be able to try any of their members.* All that they will not be able to do, after the enactment of this bill, is this: If they fire a member for some reason other than nonpayment of dues they cannot make his employer discharge him from his job and throw him out of work. That is the only result of the provision under discussion. [2 Leg. Hist. 1097].

[7] We note that Senator Ball's floor statement on which the Board places particular reliance, NLRB Br. at 23, not only fails to support the Agency's position but is, in any event, without authority, because it was made to explain Senator Ball's extreme amendment, opposed by Senator Taft and rejected by the Senate on a vote of 21 yeas and 57 nays, to abolish the union shop. *See* 2 Legislative History of the Labor Management Relations Act of 1947 (GPO) 1418-1420; *id.* at 1420 (Senator Taft); *id.* at 1427-1428 (recording the vote on the Ball Amendment).

Thus the Board is correct in viewing the legislative history of §§ 8(a)(3) & (b)(2) as relevant here, but the Board has the lesson of that history exactly wrong; the true lesson is the one this Court drew in *Allis-Chalmers*:

> Congressional emphasis that § 8(b)(2) insulated an employee's membership from his job, but left internal union affairs to union self-government, is therefore significant evidence against reading § 8(b)(1)(A) as contemplating regulation of internal discipline. [388 U.S. at 185]

(b)(i) The Board also attempts to find a right of a union member to resign at will in the conjunction of the LMRA's addition to § 7 of a "right to refrain" from engaging in concerted activities and the enactment at the same time of § 8(b)(1)(A)'s proscription on union "restrain[t] or coerc[ion]" on employees exercising § 7 rights. The Board states that read together these provisions were "intended to insure that employees, including union members, would be protected against union restraint or coercion in any decision to refrain from union or other concerted activity, including a strike." NLRB Br. at 25. The Board's statement is, in terms, unobjectionable, but that statement begs the critical questions: what do "refrain" and "restrain or coerce" mean?

The Board apparently believes that Congress intended those terms to be defined so as to leave those who choose to become full union members free from union discipline for violating a union rule requiring the member's participation in "union or other concerted activity." But the decisions in *Allis-Chalmers*, *Scofield*, and *Boeing* establish that the Board's belief is mistaken. Those decisions teach that disciplining a union member, through legal processes, for

breaching a rule requiring participation in a concerted activity does not "restrain or coerce" the individual in the exercise of his "right to refrain" from engaging in concerted action.[8] And the Board does not explain—indeed cannot explain—why, on its theory, it is permissible for a union to enforce a rule against abandoning a strike, but it is not permissible to enforce a rule against abandoning the union during a strike. Since the one does not "restrain or coerce" the member in the exercise of his § 7 rights, neither does the other.

(ii) Far from supporting the Board's contention that §§ 7 & 8(b)(1)(A) grant union members the right to resign at will, the legislative history of the LMRA shows that Congress affirmatively decided not to interfere with such internal union affairs. The Board's treatment of these aspects of the legislative history cannot withstand analysis.

First, the Board misreads the legislative history of the proviso to § 8(b)(1)(A) which protects "the right of a labor organization to prescribe its own rules with respect to the acquisition *or retention* of membership."[9] The Board contends that "Congress intended . . . to preserve

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[8] *Allis-Chalmers* concludes that this is so because imposing a fine, through legal processes, for breach of a rule to which the member voluntarily asserted by joining the union does not constitute restraint or coercion. *See* 388 U.S. at 179. It is also true that the "right to refrain" stated in § 7 does not and was not intended to connote a right to abandon at will an agreed-upon undertaking. *See* Petr. Br. at 26.

[9] In upholding union discipline, this Court has heretofore found that the discipline was not within the reach of § 8(b)(1)(A)'s proscription, and thus the proviso's "interpretation [was not] necessary to [the] conclusion." *NLRB v. Boeing Co., supra*, 412 U.S. at 71 n.5. The same is true here, but the proviso provides an independent basis for concluding that Congress did not intend to interfere with union rules governing the "retention of membership." Indeed the very purpose of the proviso was to assure that union rules governing the "acquisition or retention of membership" would survive any possible interpretation of §§ 7 & 8(b)(1)(A).

only the power of unions to admit or expel individuals wanting to gain or maintain membership." NLRB Br. at 35. But while the legislative materials the Board cites show that this was *a* purpose of the proviso, the materials do not support the Board's contention that this was the *only* purpose. The Board simply overlooks not only the statutory language but also the authoritative statements of a broader and more general purpose[10]—for example, Senator Ball's statement that the proviso "is designed to make it clear that we are not trying to interfere with the internal affairs of a union," 2 Leg. Hist. 1200, and his further statement that the proviso "covers the requirements and standards of membership in the union itself," *id. See also* Petr. Br. at 19-21.[11]

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[10] Senator Ball's statements with respect to the meaning of the proviso are authoritative as he was the sponsor of the amendment to the Senate bill that added § 8(b)(1)(A), 2 Leg. Hist. 1018, and as such he accepted, as an amendment to his amendment, the proviso proposed by Senator Holland, 2 *id.* 1114. (This is in contrast to Senator Ball's statements with respect to § 8(b)(2), which are not authoritative as he dissented from the consensus on that provision. *See* n.7, *supra.*)

[11] The Board relies on the legislative history of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA") to limit the reach of the proviso to § 8(b)(1)(A) of the LMRA of 1948, NLRB Br. at 35-36, but that reliance is misplaced. During the course of the House's consideration of the LMRDA, Rep. Powell offered an amendment which would have made it unlawful for a union to "refuse membership, segregate or expel any person on the grounds of race, religion, color, sex or national origin." 2 *NLRB Legislative History of the LMRDA* at 1648. Representatives Landrum and Griffin opposed that amendment arguing, *inter alia*, that its enactment would overturn the proviso to § 8(b)(1)(A). 2 *Id.* at 1649. But neither Representative Landrum nor Griffin suggested that the proviso applied only to union rules governing admission and expulsion of members; to the contrary, neither representative even used the word "expel" and each stated that the proviso protects union rules governing the "*retention* of membership." *Id.*

The Board somehow thinks it significant that the LMRDA defines the word "member" to mean one "who has fulfilled the requirement for membership . . . and . . . has neither voluntarily

Second, the Board fails to come to grips with the significance of the fact that in enacting the LMRA Congress expressly rejected a set of provisions, included in the House bill as §§ 7(b) and 8(c), which were designed to regulate internal union affairs including, most particularly, a provision (§ 8(c)(4)) which would have made it unlawful for a union "to deny to any member the right to resign from the organization at any time." *See* Petr. Br. at 22-32. The Board, ignoring the fact that the entirety of §§ 7(b) & 8(c) were dropped in conference, pretends that a particularized judgment was made to omit § 8(c)(4) and hypothesizes the following explanation: "[b]ecause the more general 'right to refrain' [from engaging in concerted activities] language added to Section 7 encompasses the specific act of resigning from the union, it is reasonable to assume that Congress believed that a specific provision covering resignation was unnecessary." NLRB Br. at 29.

Even assuming *arguendo* that there were some basis for believing that § 8(c)(4) did not fall with the entirety of §§ 7(b) & 8(c), the Board's hypothesized explanation still would not stand for that explanation simply assumes its conclusion—that § 7 was intended to confer a right to resign from a union at will. The Board cites no evidence to support its contention that Congress so understood the "right to refrain" from concerted activities,[12]

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withdrawn from membership nor has been expelled or suspended. . ." 29 U.S.C. § 402(o). But this definition merely states the universe of possible ways in which one who has acquired membership status can forfeit that status; because Congress was not legislating with respect to ways of retaining membership, no possible inference can be drawn from this definition as to Congress' view in 1959 of union ruler limiting resignations. It is noteworthy, however, that in § 101(a)(2) of the LMRDA, 29 U.S.C. § 411(a)(2), Congress did carefully protect a union's right to "adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution."

[12] As we explained in our opening brief (at 25-26), the stated purpose of the "right to refrain" was only to "assure that . . . the

nor does the Board offer any support for its "reasonable . . . assum[ption]" that § 8(c)(4) was dropped from the House bill because it was seen as "unnecessary."

In fact, the conference report concerning the LMRA belies the Board's theory. That report does *not* state that § 8(c)(4) is contained in substance in §§ 7 & 8(b)(1)(A) and therefore was dropped as "unnecessary" (although the report does make a similar statement concerning *other* provisions in the House bill where that was, in fact, the conference committee's reason for omitting such provisions, *see, e.g.* 1 Leg. Hist. 543-544). To the contrary, the conference report acknowledges that, with two exceptions not here relevant, *all* of the provisions of § 8(c) of the House bill "are omitted from the conference agreement." 1 *Id.* 550.

The fair reading, then, of the conference committee action—especially in light of all the other evidence of the Senate's desire not to intrude upon internal union affairs, *see* pp. 7-8, 10-11, *supra*, — is that, in the face of "a predictable presidential veto," *Pipefitters v. United States*, 407 U.S. 388, 409 (1972), and the need to attract sufficient votes in the Senate to override that veto, here, as with so many other provisions of the LMRA, "obviously the House conceded on this issue to the Senate," *NLRB*

Board will be prevented from compelling employees to exercise such [§ 7] rights against their will."

The NLRB attempts to attribute a broader purpose to that right by quoting Representative Hoffman's statement that § 7 gave workers "the right to join or not to join, to be bound or not to be bound by union rules." NLRB Br. at 25 n.17. But those words were spoken as part of Hoffman's unsuccessful effort to amend the House bill on the House floor to ban the union shop. And even if his statements were authoritative—and they are not—they would establish nothing more than a congressional intent to protect workers from employment-related sanctions in deciding whether to join a union, *see* pp. 7-9 *supra*; nothing in Representative Hoffman's rhetoric suggests an intent to establish a right of union members to resign at will.

v. Hendricks County Rural Electric Corp., 454 U.S. 170, 184 (1981). And Congress' action in abandoning the provisions regulating internal union affairs (including the proposed § 8(c)(4)) "strongly mitigates against a judgment that Congress intended a result that it expressly declined to enact." *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200 (1974). *See also* Petr. Br. at 32-33.[13]

[13] In addition to the provisions discussed in text, the House bill also included, as part of its version of § 8(b)(1)(A), a proscription on union efforts "by intimidating practices . . . to compel or seek to compel any individual to become *or remain* a member of any labor organization"; this language also was omitted from the bill as enacted in favor of the Senate's more limited version of § 8(b)(1)(A). *See* Petr. Br. at 24-34. The Board asserts that "the final version of Section 8(b)(1)(A) was broad enough to include these specific unfair labor practices [included in the House bill] and that the House bill's language was therefore merely redundant." NLRB Br. at 28. But the only source the Board cites for this assertion is p. 44 of the conference report, 1 Leg. Hist. 548, which says nothing of the kind. The cited page does not even discuss § 8(b)(1)(A) in terms but rather states that the Senate version of § 8(b) *as a whole* was "broader in scope than the corresponding provision of the House bill"—a reference to the fact that the Senate's § 8(b) included four more subsections than the House's and covered a number of subjects, such as secondary boycotts, not covered in the House's § 8(b). But there is nothing in the conference report to suggest, as the Board urges, that with respect to those subjects that were treated in both the Senate and House bills (such as interference with § 7 rights), the conferees intended, in adopting the narrower Senate language, to give it the same reach as the much broader House language.

CONCLUSION

For the foregoing reasons, and those stated in our opening brief, the judgment of the court of appeals should be reversed.

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